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THE NORTHERN TRUST COMPANY, a corporation of Illinois, as trustee under the trust deed dated June 27, 1928, and recorded in the Recorder's Office of Cook County, Illinois, as Document No. 10173103, et al.,
Plaintiffs and Appellees,

v.

MARGUERITE COOK et al.,
Defendants.

ROY D. KEEHN,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

294 I.A. 601

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 30, 1922, David C. Cook, the owner of property known as 300-308 North Michigan avenue and 72-82 East South Water street, Chicago, improved with a four-story brick office and store building, demised the premises to Roy D. Keehn for a period of 99 years at a rental of $50,000 a year, payable in advance in equal quarterly installments; and from 1932 at a rental of $55,000 per annum, payable in like manner. The lease recited that the lessee had purchased the building on the premises for $100,000, the receipt of which was acknowledged by the lessor; the lessee was also required to pay all taxes and assessments and there was a provision that if he defaulted in the payment of rent or defaulted in any of the other covenants of the lease for a period of thirty days, it would be lawful for the lessor to declare the term ended, that if the lease were terminated by forfeiture or lapse of time, the lessee would surrender and deliver

38772

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2941.A. 601

Appellant.

IN PROHIBITING LUETICE OTCOMBOR
DELIVERING THE OPINION OF THE COURT.

...ugust 30, 1922, David C. Cook, the owner of property known as 306-308 North Michigan avenue and 78-82 East South Water street, Chicago, improved with a four-story brick office and store building, demised the premises to Roy M. Keelin for a period of 99 years at a rental of $50,000 a year, payable in advance in equal quarterly instalments; and from 1952 at a rental of $65,000 per annum, payable in like manner. The lease recited that the lessee had purchased the building on the premises for $460,000, the receipt of which was acknowledged by the lessor; the lessee was also required to pay all taxes and assessments and there was a provision that if he defaulted in the payment of rent or defaulted in any of the other covenants of the lease for a period of thirty days, it would be lawful for the lessor to declare the term ended, that if the lease were terminated by forfeiture or lapse of time, the lessee would surrender and deliver

up the premises to the lessor together with the improvements and that all buildings, etc., then on the premises should belong to the lessor and no compensation should be allowed or paid therefor.

June 27, 1928, the then owners of the premises, including Marguerite Cook, the widow of the lessor, David C. Cook, executed their trust deed which is in foreclosure in the instant case, to secure an indebtedness of $318,500, evidenced by forty notes due five years after date. The trust deed was subject to the 99 year lease and provided that, "all the interest of the lessor under said lease being expressly covered by this Indenture, reserving to the lessee the right to pay to such lessor the rental due under said lease as the same becomes payable but not in advance." The rents, issues and profits were also pledged as additional security for the payment of the indebtedness. The tenant fell behind in the payment of taxes and in the installment of rent falling due October 1, 1933, and on March 31, 1934, Mrs. Cook, the then owner of the premises, served a written notice on the tenant to terminate the lease because of the default in payment of the installment of rent. Afterward she filed her complaint in the Superior court of Cook county against the tenant and others praying for the removal of the lease upon her title which suit is still pending.

July 17, 1934, the instant case was brought to foreclose the trust deed. Mrs. Cook, the tenant, Keehn, and others were made defendants. It was alleged in the complaint that the interest of plaintiffs was subject to the 99 year lease and on information and belief it was alleged that Mrs. Cook had elected to terminate the lease but that her purported cancellation was void and ineffective because the right of cancellation and termination of the lease was conveyed by the trust deed. The prayer was for foreclosure, the appointment of a receiver, and in case of deficiency, for a personal decree against

up the premises to the lessor together with the improvements and that all buildings, etc., then on the premises should vest in the lessor and no compensation should be allowed or paid therefor.

June 27, 1939, the then owners of the premises, including Dorothy Cook, the widow of the lessor, Jerald T. Cook, executed their quit claim deed which is in foreclosure in the instant case, to release an indebtedness of $218,000, evidenced by forty notes due five years after date. The quit claim deed was subject to the 99 year lease and provided that, "all the interest of the lessor under said lease being expressly covered by this indenture, reserving to the lessee the right to pay to such lessor the rental due under said lease as the same become payable but not in advance." The lessee, lessee and grantee were also plaintiff and defendant in a mechanic's lien foreclosure suit in the Superior Court of Cook County, Illinois, which suit is still pending.

July 17, 1939, the instant case was brought to foreclose the trust deed. Mrs. Cook, the lessee, Joslyn, and others were defendants. It was alleged in the complaint that the interest of plaintiff was subject to the 99 year lease and an unrecorded modification thereof. It was alleged that Mrs. Cook had elected to terminate the lease but that the purported cancellation was void and ineffective because the right of cancellation and termination of the lease was exercised by the lessee, only in case of default, for a reasonable period after notice, and in case of default, for a reasonable period after notice, and

Mrs. Cook. Mrs. Cook filed her answer setting up, among other things, that she had served notice on the tenant, Keehn, to terminate the lease. Keehn, in his answer, denied that plaintiffs were entitled to declare the lease terminated or that plaintiffs had any right to attempt to enforce any of the covenants or conditions of the lease on the building now on the premises or to have such building sold under a decree to satisfy the lien of the trust deed. He admits that Mrs. Cook cancelled and terminated the lease by giving him notice in writing, as the lease provided, and that afterwards she filed suit in the Superior court to remove the lease from the premises. The case was referred to a master in chancery as was also the motion of plaintiffs for a receiver. The master took the evidence, made up his report, found that by reason of the default payment of the principal and interest of the indebtedness secured by the trust deed, the title to the property "became a defeasible title in said plaintiffs as between them and the said defendant, Marguerite Cook," including her lessee, Roy D. Keehn, and that after such default plaintiffs were entitled to the rents falling due under the lease and recommended that a receiver be appointed to be effective, as per order of court theretofore entered as of February 13, 1935.

The master further found that the serving of notice of the termination of the lease by Mrs. Cook on defendant Keehn was ineffective; that there was $371,804.43 of the indebtedness secured by the trust deed over and above the foreclosure expenses due and unpaid and default in the payment of taxes of more than $133,000, and that in case the property was sold and there was a deficiency, Mrs. Cook was personally liable therefor.

Objections to the report were filed and overruled and they were ordered to stand as exceptions, and a decree entered which

Mrs. Cook. Mrs. Cook filed her answer setting up, among other things, that she had served notice on the tenant, Jenkin, to terminate the lease. Jenkin, in his answer, denied that plaintiff were entitled to declare the lease terminated or that plaintiff had any right to attempt to enforce any of the covenants or conditions of the lease on the building nor on the premises or to have such building sold under a decree to satisfy the lien of the trust deed. He asked that Mrs. Cook be compelled and required the lease by giving him notice in writing, as the lease provided, and that afterwards she filed suit in the chancellor court to remove the lease from the premises. The case was referred to a master in chancery to hear also the motion of plaintiffs for a receiver. The master took the evidence, made up his report, found that by reason of the default payment of the principal and interest of the indebtedness secured by the trust deed, the title to the property "became a defeasible title in said plaintiffs as between them and the said defendant, Marguerite Cook," including Mrs Jenkins, but Jenkin, and that after such default plaintiffs were entitled to the rents, issues due under the lease and recommended that a receiver be appointed to be effective, as per order of court theretofore entered by of February 13, 1934.

The master further found that the serving of notice of the termination of the lease by Mrs. Cook on defendant Jenkin was ineffective; that there was $47,804.43 of the indebtedness secured by the trust deed over and above the rental due and unpaid and default in the payment of more than $10,000, and that in case the property was sold the lease was a definite, Mrs. Cook was personally liable thereof.

Objections to the report were filed and exceptions were ordered to stand as exceptions, and a decree entered with

recited the overruling of all exceptions.

So far as it is necessary to state the findings of the decree for the purpose of this appeal, it is sufficient to say that the decree found (after reciting the serving of the notice of the forfeiture of the lease by Mrs. Cook on the defendant, Keehn,) that "said action on the part of Marguerite Cook happened after the default made by her in the payment of the indebtedness secured by the trust deed hereby sought to be foreclosed, and the same was not approved by the said plaintiffs, and, so far as plaintiffs' rights and interests herein are concerned, her acts in that behalf have no effect thereupon. The finding in this paragraph is not conclusive as to the defendant Roy D. Keehn and the Court hereinafter reserves the right to re-examine and determine the finding of fact and the legal conclusion thereon."

The decree then finds the amounts due from Mrs. Cook; and that plaintiffs have a valid and first lien upon the mortgaged property and all rights of Mrs. Cook therein "as the same existed at the date of said Trust Deed, including the rents, issues and profits, subject however to the rights and interests of the defendant, Roy D. Keehn, as set forth in the lease made to him by David C. Cook." And it was decreed that unless the indebtedness was paid within 3 days, the premises, subject to the 99 year lease, and all rights of Mrs. Cook in the premises and under the lease, be sold to satisfy the indebtedness.

The defendant, Roy D. Keehn, alone, prosecutes this appeal. The burden of his argument is that his 99 year lease was terminated by the notice served upon him by the then owner of the premises, Marguerite Cook. His contention, as stated by his counsel is "Appellant's theory of the case is that the lease and all obligations of appellant, lessee, thereunder, were canceled and terminated by the declaration and notice to terminate and cancel the lease given

to lessee by Marguerite Cook on March 31, 1934; and the notice of appeal prays relief by order or decree to that effect."

On the other side, counsel for plaintiffs say that the question advanced by the lessee, Keehn, as ground for a reversal of the decree is in no way involved because Keehn's interests under the lease are expressly reserved by the terms of the decree. They take the further position that in any event the decree ought to be affirmed because the attempted cancellation of the lease by Mrs. Cook was ineffective.

We hold that under the express provisions of the decree the rights of defendant, Keehn, so far as his rights under the lease are involved, are not affected but are reserved for the further consideration of the court.

In the decree, after finding that the rights of the plaintiffs were not affected by the notice of termination given by Mrs. Cook to Keehn, it is expressly stated that such finding is not conclusive as to Keehn, and that the court "reserves the right to re-examine and determine the finding of fact and the legal conclusion thereon." There is similar language in the decree with reference to the payment of costs and attorney's fees, which provides that such findings are subject "to the rights and interests of the defendant, Roy K. Keehn, as set forth in the lease." The decree also reserves the question as to the personal liability of Mrs. Cook in case of deficiency after sale, as is the question of the appointment of a receiver.

Holding as we do, that the rights of defendant, Keehn, under his lease have not been adjudicated but have been expressly reserved for further consideration by the court, we would not be warranted in passing on the further contention advanced by plaintiffs.

The decree of the Superior Court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely and Matchett, JJ., concur.

39703

RELIABLE MANUFACTURING COMPANY,
A Corporation,
Appellee,

vs.

VAUGHAN NOVELTY MANUFACTURING
COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

294 I.A. 601

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages, claiming that defendant had wrongfully sent notices and letters to plaintiff's customers stating that a can opener which was being manufactured and sold by plaintiff was an infringement of one which was manufactured and sold by defendant. There was a jury trial and a verdict and judgment in plaintiff's favor for $9,000 and defendant appeals.

The record discloses that Reyburn T. Chase of Camden, N. J., obtained letters patent dated February 8, 1927, and May 15, 1928, covering certain can openers, and on October 28, 1929, entered into an exclusive license agreement with defendant, Vaughan Novelty Manufacturing Company, embodying the improvements covered by the letters patent. The agreement provided that in the event other letters patent should be granted to the licensors for improvements in can openers, "of that type and design described in and covered by the claims of said basic patent #1617148, the licensee shall have an exclusive license to these under the same terms as herein set forth."

Prior to the execution of this agreement Chase had an application pending in the patent office in Washington for another can opener and endeavored to induce defendant to enter into an agreement for a license covering the can opener described in the application, but defendant refused to do so.

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December 7, 1929, Chase entered into an exclusive license agreement with Charles J. Leigh of Chicago, authorizing him to manufacture and sell can openers covered in the application, in case a patent should thereafter be issued to Chase.

May 20, 1930, letters patent were issued to Chase covering the can opener described in his application. February 17, 1930, Leigh assigned all his rights under the license agreement to plaintiff, the Reliable Manufacturing Company, which had shortly before been incorporated under the laws of Illinois. Defendant has been in business since 1910, manufacturing specialties, including can openers and kitchen utensils and had built up a considerable business; shortly after it entered into its license agreement with Chase it began to manufacture and sell can openers under Chase's patents, one of which was known as "Safety Roll" and the other as "Kleen Kut." After February 17, 1930, plaintiff began to manufacture and sell the can opener known as the "Gem" covered by its license. Defendant contended that the "Gem" can opener was of the same type and design as its "Safety Roll" and in March, 1930, which was before the patent was issued to Chase for the third can opener, it learned that plaintiff was about to manufacture and sell the Gem can opener, and it consulted its counsel, patent attorneys in Chicago, in regard to its rights under its license agreement from Chase. And on March 7, 1930, before plaintiff had begun to manufacture the Gem can opener, defendant's counsel advised the Keystone Die & Stamping Company, which was preparing the dies for plaintiff for the Gem can opener, that that can opener would be an infringement of defendant's can opener, and that if it manufactured the dies and they were used to produce the can opener, it would be liable as a contributory infringer. On the same day counsel also wrote a letter to one of plaintiff's officers saying counsel had been advised by their client, the defendant, that

it would hold plaintiff company liable if it manufactured the can opener as proposed because it would be a direct infringement of the letters patent, of which defendant was the exclusive licensee. The letter said, "We shall hold you strictly to account for the manufacture or sale of can openers coming under the claims of either of the aforementioned patents and we shall hold the die maker to account who is producing the dies for you, or who may produce the completed article for you. This notice is given for the purpose of enabling you to withdraw from the manufacture or sale before you have become further involved." What answer, if any, was made by the die company or by the plaintiff does not appear. March 14, 1930, defendant sent a "notice of infringement" to the trade, in which it was stated: "We are informed that a number of dealers are selling a certain type of can opener ***" (Describing it). And that a can opener of this type was covered by defendant's exclusive license under the two patents issued to Chase. And further, that "If you are selling can openers generally coming within the above description, *** we believe such construction infringes our patents," but if there was any doubt the person addressed should consult his counsel or procure copies of the patent. These notices were mailed to persons and firms who bought can openers from plaintiff.

June 13, 1930, defendant also sent letters to a number of plaintiff's customers in which it was stated that defendant was informed "you are selling or permitting to be demonstrated in your store a Can Opener under the trade name of 'Gem', which we wish to advise is a direct infringement on our 'Safety Roll' Can Opener on which we have a number of patents. We are, therefore, enclosing copy of letter prepared by our attorney which is self-explanatory, and will accordingly request that a discontinuance of the sale of said Can Opener be effected at once."

August 1, 1930, plaintiff's attorneys, who were familiar with the law relating to patents, sent defendant a registered letter in which they said, "Our client, which manufactures and sells the 'Gem' can opener, has submitted for our consideration numerous letters which you have written to its customers wherein you assert both directly and by innuendo, *** that the Gem can opener "is an infringement of patents under which you are licensed." This practice indulged in by you of sending threatening letters to our client's customers has become intolerable and our client does not intend to permit it to continue." And further, that if defendant thought its patent was being infringed by plaintiff, the proper course for defendant to pursue was to bring suit. "Apparently you have contented yourself with sending threatening letters to our client's customers and have refrained from bringing a suit to test your alleged rights, because you well know, as do we, that there is nothing to your claim with respect to infringement." And the letter notified defendant that if within one week it had not brought suit against plaintiff for the claimed infringement, or had not given assurance that it would cease writing defendant's customers, "our client will file a bill in equity seeking an injunction and accounting." What took place after the sending of this letter does not appear, except that plaintiff did not file the bill in equity and no action was taken until defendant filed its bill in equity in the United States District Court May 4, 1931, charging that the Reliable Manufacturing Company infringed the patents under which it held an exclusive license and injunctive relief and damages were sought.

The Reliable Manufacturing Company, defendant in the equity suit, filed its motion to dismiss on the ground that "upon the face of plaintiff's bill and the stipulation of the parties that defend-

ant's device for opening cans does not infringe the patents sued upon." The motion was sustained and a decree entered. The decree of the Federal Court, entered June 2, 1932, stated that the cause came on to be heard upon the amended bill of complaint, the letters patent and stipulation, identifying defendant's can opener and specifying "the claims of the patents in suit relied upon by the plaintiffs." And it was decreed that, "the manufacture, use and sale of said Gem Can Opener does not infringe said Letters Patent or either of them." The suit was dismissed at plaintiff's costs. No appeal was taken from this decree.

November 3, 1934, about 2½ years after the entry of this decree, plaintiff filed the instant suit.

1. Defendant contends that plaintiff's action is one of slander and libel and barred by the provisions of sec. 13, chap. 83, Ill. State Bar Stats. 1937, which provides that an action for slander and libel shall be commenced within one year next after the cause of action accrued. And that it appears from the face of the complaint that the last alleged wrongful and malicious acts of defendant occurred in 1932, which was more than one year before the cause was brought. We think this contention cannot be sustained. Plaintiff's action is not for slander or libel, but is an action on the case brought to recover special damages. Such an action "is denominated slander of title, by a sort of figure of speech, in which the title is personified. Slander of title may be defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, or of some right of his, giving him special damage.

"The remedy for a slander of title ordinarily is an action at law, based on the tort in the nature of an action of trespass on the case." 37 Corpus Juris, pp. 129-130. The five-year statute of limitations is applicable. Sec. 15, chap. 83, Ill. State Bar

Stats. 1937.

2. Defendant further contends that, "The exclusive licensee of a patent, who, for the protection of his rights, and acting in good faith, issues notices to competitors and customers asserting his rights, is not liable in an action based thereon," although it turns out there was infringement. And that in the instant case plaintiff cannot recover because "the necessary elements of malice or want of good faith and want of probable cause have not been proven;" but that the evidence is to the contrary; that it shows that defendant acted in good faith and without malice; that it had probable cause for believing and insisting that plaintiff, by the manufacture and sale of the Gem can opener was infringing the patents under which defendant held exclusive license, and furthermore, that no recovery can be had because defendant, at all times, acted under the advice of competent counsel. Counsel for plaintiff seems to admit that the law is as contended by counsel for defendant. They say, "While the licensee of a patentee acting in good faith may protect his interest in a patent by sending cautionary notices to the trade and will not be liable although his claim of infringement may in fact be untrue," that in the instant case the evidence shows defendant did not believe or could not honestly have believed that plaintiff was infringing defendant's rights under the patent, and therefore the verdict and judgment in plaintiff's favor should be sustained.

The evidence shows that when defendant, of Chicago, was negotiating with Chase, the patentee who lived in New Jersey, for the exclusive license of the two patents then held by Chase, defendant's counsel prepared and submitted an agreement for license which Chase refused to execute because some of the language used was of such a general character that it might be construed to include the can opener described in Chase's application for patent then pending in Washing-

ten, and that Chase offered to give defendant a license for that can opener, and advised defendant that if it desired a license for the Gem can opener it must pay the additional amount in a day or two because Chase was then negotiating with another party with a view of giving such other party a license to manufacture and sell the Gem can opener, which contract might be made "any day now;" that defendant advised Chase that it did not desire a license to manufacture and sell the Gem can opener.

October 14, 1929, Chase wrote defendant's counsel a letter in which he said, "As I intimated in my last letter to them, I think that the terms 'same general type and design' are too general and all inclusive. *** I have two applications pending in the patent office, both of which include one or two of the same elements as this one, and might be considered as of the same general type and design as this one;" that his application for the Gem can opener had been in interference with two others, but he had been awarded priority and the limit of appeal had passed; that he had written Mr. Vaughan (defendant's president) about the matter and while the Gem can opener might be considered as of the same general design as the one covered by the patents for which defendant was negotiating for a license, yet Chase would "have to insist on wording that will not involve it in litigation to determine who it belongs to."

Ten days later, October 24, Chase wrote Vaughan, saying he was enclosing the contract signed by him, and "I have altered the 7th Clause so that it is satisfactory to me, and I believe, from a thorough study of your letter, that it should be satisfactory to you," and stated that the agreement as changed gave defendant the right to all improvements on the two patents, "but does not include my applications now pending, ***. My objections to the words used by your attorneys was that they were too general and vague." The

ton, and that Chase offered to give defendant a license for that can opener, and advised defendant that if it desired a license for the Gem can opener it must pay the additional amount in a day or two because Chase was then negotiating with another party with a view of giving such other party a license to manufacture and sell the Gem can opener, which contract might be made "any day now;" that defendant advised Chase that it did not desire a license to manufacture and sell the Gem can opener.

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Ten days later, October 24, Chase wrote Vaughan, saying he was enclosing the contract signed by him, and "I have altered the 7th Clause so that it is satisfactory to me, and I believe, from a thorough study of your letter, that it should be satisfactory to you," and stated that the agreement as changed gave defendant the right to all improvements on the two patents, "but does not include my applications now pending, ***. My objections to the words used by your attorneys was that they were too general and vague." The

evidence is undisputed that Chase specifically told defendant and its counsel that Chase changed the wording of the proposed license agreement so it would be clear that it did not include a license under the patent for the Gem opener. If defendant did not want to accept the license as modified, and as construed by Chase, it would seem that good faith would require that Chase be advised of this fact. But there is no evidence that defendant objected to the contract as modified and interpreted by Chase before it was executed by defendant. Obviously Chase understood and intended that the license agreement which he gave to defendant did not include the Gem can opener. Defendant knew that this was Chase's understanding and intention, but it said nothing and did nothing until after Chase had given plaintiff a license for the Gem can opener and until plaintiff was preparing to manufacture and sell the Gem can opener. In these circumstances, in any view of the evidence we think whether defendant acted in good faith when it sent its "Notice of Infringement" to the Keystone Die & Manufacturing Co., which was making the dies for defendant, and to the defendant, and afterward to the defendant's customers, was a question of fact for the jury. The jury by its verdict found in favor of plaintiff and against defendant. Its verdict was approved by the trial Judge, and upon a consideration of all the evidence we are unable to say that the finding is against the manifest weight of the evidence and are clear that we would not be warranted in disturbing the judgment. And we reach the same result,if we assume, as we do, that defendant explained all of the matters to its counsel.

Counsel for plaintiff also say that the delay of defendant in bringing its suit for infringement in the United States District Court raises a strong inference that defendant had no real confidence in its position, and is such evidence of bad faith as would sustain the jury's verdict; that defendant in March 1930, knew that plaintiff

was proceeding to manufacture and sell the Gem can opener, and that defendant did not bring his action in the Federal Court until May 4, 1931, a delay of fourteen months. The failure for an unreasonable length of time by the patentee or his licensee to bring suit against an infringing manufacturer or any of his purchasers to determine the question of infringement after distribution of notices of claimed infringement is considered to be conclusive evidence of bad faith. Racine Paper Goods Co. v. Dittgen, 171 Fed. 631. But what is an unreasonable length of time obviously depends upon the facts of each particular case.

In reply defendant says that the delay may be explained by the correspondence between counsel for plaintiff and defendant; that plaintiff's counsel, in its letter of August, 1930, advised defendant that unless defendant desisted in sending out notices of claimed infringement or brought suit within one week, plaintiff would institute suit; that defendant failed to bring suit and that "the defendant attempted to have Chase, the inventor, protect it against the third patent and have Chase pay for the cost of instituting suit against plaintiff. Negotiations with Chase extended over a period of six (6) months, and when Chase refused to protect defendant by instituting suit against plaintiff, then defendant started its suit in the Federal Court in May, 1931." And further, that defendant could reasonably believe plaintiff would carry out its threat and institute suit, as its counsel stated would be done. We think defendant might well have waited a reasonable length of time to ascertain whether plaintiff would bring suit. But we think defendant goes much too far when it explains its delay in bringing suit by the fact that it was seeking to have Chase defray the cost of such suit. Obviously Chase could not be expected to do this because he had taken the position and was still contending that there was no infringement of plaintiff's license in the manufacture

and sale of the Gem can opener, the patent for which had been awarded to Chase. We think such contention is wholly without merit and it is not at all surprising that the jury found for plaintiff on the question of good faith.

3. Defendant further contends that the evidence was insufficient to support the jury's verdict on the question of damages; that the damages, if any, were speculative, for which no recovery can be had. The evidence is to the effect that plaintiff had a number of customers who had purchased the Gem can opener; that plaintiff was demonstrating it in a number of large stores and that when these customers received notice from defendant that the sale of the can opener by plaintiff's customers was an infringement of defendant's license under the patents, some of them ceased to make further purchases, some returned the can openers they then had on hand, some of them caused the persons who were demonstrating the can openers to withdraw from their stores, and there is a great deal of evidence giving the names and the sales of a number of plaintiff's customers. There is also some evidence as to the profit plaintiff was making on some of the sales. Obviously the exact amount of damages sustained could not be mathematically determined, nor is this necessary because under the law plaintiff might be entitled to vindictive or punitive damages, and the jury was so instructed. It was not necessary for plaintiff to establish its damages with mathematical certainty. Daughetee v. Ohio Oil Co., 263 Ill. 518; American Ball Co. v. Fed. Cartridge Corp., 70 Fed. (2d) 579. In the Ohio Oil Co. case it was held that in an action for damages resulting from a breach of a contract or a duty imposed by law, the damages must be the proximate result of the injury complained of, and the fact that the damages are difficult of exact ascertainment is no defense to the action. The court there said (p. 525): "It is undoubtedly the law

that where speculation or conjecture must be resorted to for the purpose of determining whether the injury results from the wrongful act charged or from some other cause, then the law denies the injured party his action for damages. This is only another way of stating the familiar rule that damages must be the proximate result of the injury complained of. *** The right of recovery being assumed, plaintiff in error cannot escape liability because the damages are difficult of exact ascertainment. The nature of the inquiry here is such that it is practically impossible to ascertain with mathematical certainty the exact amount of defendant in error's damages. This, however, affords no answer to a cause of action resulting from the breach of contract or a duty imposed by law. The unliquidated damages growing either out of breach of contract or the commission of a tort are seldom susceptible of exact measurement. If such exactness were required the law of damages would be of little practical value."

We think the evidence in the instant case was sufficient to submit the question to the jury under proper instructions, under the rule laid down by our Supreme court in the case just quoted from.

4. Complaint is made that the court erred in admitting improper evidence on behalf of plaintiff and refused to admit proper evidence offered by defendant. Most of the rulings complained of were in connection with letters passing between the parties and some of plaintiff's customers.

Plaintiff's counsel say that so far as the record discloses, the last notice or letter sent by defendant to the trade was on June 13, 1930, and that plaintiff, for the purpose of showing a continuance of the sending of such notices after that date and to show malice, offered the letter which purported to be sent by the Creamed Foods, Inc., to plaintiff on June 3, 1931. This letter stated that

the Creamed Foods, Inc., had received a letter from defendant stating defendant had just started suit against plaintiff for the infringement of the patent and therefore Creamed Foods, Inc., thought it would not be advisable for them to undertake handling the Gem can opener. A number of objections were made to this letter when it was offered, but in the brief counsel say that the letter was "purely hearsay," but no such objection was urged on the trial. In these circumstances the objection that it was hearsay evidence cannot be made for the first time in this court. Hearsay evidence is competent if not objected to. Hoover v. Empire Coal Co., 149 Ill. App. 258; Percival v. Schneider, 255 Ill. App. 428; 3 Jones on Evidence (2d) Sec. 1078.

Complaint is also made as to other evidence offered, such as bad checks given by the witness Gallagher to defendant company. We think these checks were properly excluded. They only went to the credibility of the witness and there was sufficient other evidence on this question. Further complaint is made that the court, during the course of the trial when objection was made to the admission of certain evidence, reserved his rulings. We think this should not have been done. Under the circumstances disclosed by the record, we think the court should have ruled on the several exhibits when they were offered so as to avoid confusion.

5. Defendant complains of instructions 1, 2, 4, 5, 6, 8, 9, 10 and 11 given at plaintiff's request, and further, that the court erred in modifying an instruction and refusing to give two instructions offered by defendant. We think we ought to say that the abstract of the instructions is very confusing and is not in accordance with established practice. Following the instructions are a number of specific objections made, which only tend to confuse.

Complaint is made of instruction 1 because by it the jury was

told, among other things, that if plaintiff lost "customers and prospective customers" and the plaintiff suffered damages as the result, the verdict should be against defendant; and the argument is "not a single customer or prospective customer of the plaintiff was asked *** whether they were induced not to trade with plaintiff on account of any of the acts of defendant." We think the objection unwarranted. The evidence tends to show that a number of plaintiff's customers stopped dealing in the Gem can opener after receiving the notice of infringement which defendant sent to them.

The substance of instruction No. 2 was whether the defendant fairly communicated to counsel all the facts pertaining to the patent and used reasonable diligence to ascertain such facts, and whether defendant acted in good faith upon advice of its counsel are questions for the jury to determine from the evidence. The objection to this instruction, counsel say, is that there is no evidence in the record from which the jury might find defendant had not communicated all material facts to its counsel. We think the objection must be sustained. Defendant's counsel seems to have been fully advised of all the facts.

Instruction No. 4 was as follows: "The defendant being a corporation, can only act through its officers and agents, and it is responsible for the wilful, reckless, or malicious acts of its officers or agents done within the scope of their employment." This is an abstract proposition of law and ought not to have been given. The jury might think the court was of opinion that defendant was malicious or reckless in what it did. People v. Corbishly, 327 Ill. 312; Ogren v. Sundell, 220 Ill. App. 584.

By instruction No. 5 the jury was told "that the question of defendant's malice is a question of fact for the jury upon consideration of all the facts, letters, conversations and other testimony in evidence in this cause." The objection to this is that there was

nothing in the letters from which malice could be implied, but on the contrary the letters were sent under advice of counsel. We think the question of malice, under all the facts, was for the jury.

Instruction No. 6 was on the question of damages. By it the jury was told that if they believed from a preponderance of the evidence under the instructions of the court the jury found the issues for the plaintiff and that it had sustained pecuniary damages in its business, "then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof and by considering them in connection with their knowledge, observation, and experience in the business affairs of life." Counsel for plaintiff say that this instruction was approved by the Supreme court in No. Chicago Street Railway Co. v. Fitzgibbons, 180 Ill. 466, but we think it obvious that case is not authority that would justify the giving of the instruction in the instant case. That was a personal injury case where plaintiff sought to recover damages, claiming she was injured while alighting from a street car. The court in discussing an instruction substantially the same as the one before us there said (p. 470): "Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires that the amount shall be proved. But there are other elements in this case which are not capable of exact measurement. The amount of compensation for pain and suffering and the future consequences reasonably certain to result are not capable of exact proof by any pecuniary standard. Such damages are alleged in the declaration and the evidence tends to prove them. Damages of that class must be proved by the evidence and must not be un-

certain, contingent or speculative."

Complaint is made to instruction No. 8 because it submitted to the jury the question of probable cause, which counsel contend was a question of law and not one of fact for the jury. From what we have said, this contention cannot be sustained.

By instruction No. 9 the jury was told that if it found for the plaintiff in assessing damages it might consider the pecuniary damage, if any, shown by a preponderance of the evidence, which resulted to plaintiff by loss of sales to its customers, etc., "and in addition you may consider the pecuniary damages, if any are proved by a preponderance of the evidence in this case, resulting to the plaintiff by the loss, if any, of sales to prospective customers, if any," etc. Any damage plaintiff might sustain on account of "loss of prospective customers," was speculative and ought not to be considered.

By instruction No. 10 the jury was told that in addition to actual damages, if any, which it might find plaintiff had sustained it might also, in its discretion, include punitive or exemplary damages, etc. The objection to this instruction is that it entirely disregards the question of "probable cause." We think the objection cannot be sustained. Counsel make no contention that exemplary damages may not be included in the jury's verdict.

Instruction No. 11 told the jury that malice "means a wrongful act done intentionally and without just cause or excuse." We think the instruction should have been worded as counsel for defendant contend.

The court modified an instruction offered by defendant which told the jury that if it found from the evidence that the suit filed by defendant in the Federal court was on the advice of counsel and that full information of all the material facts was submitted by defendant to its counsel, then the jury should con-

certain, contingent or speculative."

sider such advice of counsel as evidence of good faith on the part of defendant "as negativing malice." We think this instruction, as submitted, was not in proper form and the court did not err in modifying it. Obviously, it was proper for the jury to consider the facts mentioned in the instruction as shown by the evidence touching the question of defendant's good faith and want of malice. But we think the instruction was inartificially drawn. One of the instructions tendered by defendant, which the court refused, was on the question of good faith of the defendant. Defendant was entitled to have an instruction on this question given to the jury and also was entitled to have the jury told that if defendant acted in good faith on advice of counsel, then plaintiff could not recover although the Federal court later held there was no infringement by plaintiff of the patents under which defendant held an exclusive license.

We think we ought to say that where the instruction is given directing a verdict, it ought to contain all the essential elements, and we find a number of instructions given on behalf of plaintiff that do not meet this requirement. Cromer v. Borders Coal Co., 246 Ill. 451; Gage v. City of Vienna, 196 Ill. App. 585.

It is argued that the verdict is excessive, and the trial Judge in passing on the motion for a new trial seemed to have been of this opinion, but finally overruled the motion. We do not pass on this question, but are of opinion that it was reversibly erroneous for the court to give the instructions above criticized on the question of damages.

For the reasons above stated the judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, J., concurs.

McSurely, J., dissents: I do not think the errors in the instructions serious enough to require a reversal.

39816

JOHN J. VAN DER AA,
Appellant,

vs.

GERRIT EENIGENBURG and
PIETERTJE EENIGENBURG,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

294 I.A. 601

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in attachment against defendants, non-residents, alleging that they were indebted to him upon a written guaranty in the sum of $1900 with interest; upon trial the verdict was for defendants and plaintiff appeals from the judgment. Defendants say they were released from liability on their guaranty, and whether this was proved rests upon the facts.

Defendants owned a house and lot in Lansing, Illinois; plaintiff is a real estate broker and on December 21, 1928, procured the sale of this property to Henry and Bertha Gregg; in payment the Greggs assumed a first mortgage, conveyed certain vacant real estate and contracted to pay the remaining purchase price - $2300 - at the rate of $40 a month.

Subsequently defendants wished to sell this contract of the Greggs and approached plaintiff, who told them he had a purchaser named Milton Waterman who would pay them $1433 for their interest in the contract; defendants were willing to accept this and on January 24, 1929, at the request of plaintiff, they executed an assignment of the contract to Milton Waterman, trustee, and also executed a warranty deed conveying the property to the same party. In this assignment defendants guaranteed the prompt payment of the amounts mentioned in the contract. It is upon this guaranty that plaintiff has brought suit.

Plaintiff took this contract to a bank in South Holland,

39316

JOHN J. VAN DEN AA,

Appellant,

vs.

CHARLIT HEINDENBURG and
PIETERTJE HEINDENBURG,

Appellees.

ALTMAN-WEISS-GOLDSMITH COMPANY

OF CHICAGO, PRINTERS.

2941.A.601

MR. JUSTICE MCCONNELL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in attachment against defendants, non-residents, alleging that they were indebted to him upon a written guaranty in the sum of $1900 with interest; upon trial the verdict was for defendants and plaintiff appeals from the judgment. Defendants say they were released from liability on their guaranty, and whether this was proved rests upon the facts.

Defendants owned a home and lot in Lansing, Illinois; plaintiff is a real estate broker and on December 21, 1929, procured the sale of this property to Henry and Bertha Krenk; in payment the Krenks assumed a first mortgage, executed certain vacant real estate and contracted to pay the remaining purchase price - $2300 - at the rate of $40 a month.

Subsequently defendants wished to sell this contract of the Krenks and approached plaintiff, who said then he had a purchaser named Milton Waterman who would pay them $1800 for equity interest in the contract; defendants were willing to accept this and on January 24, 1930, at the request of plaintiff, they executed an assignment of the contract to Milton Waterman, trustee, and also executed a warranty deed conveying the property to him free and clear. In this assignment defendants guaranteed the prompt payment of the amounts mentioned in the contract. It is upon this guaranty that plaintiff has brought suit.

Plaintiff took this contract to a bank in South Holland,

Illinois, of which Waterman was an officer, and borrowed from the bank $1500, giving his note for this amount and depositing the contract as collateral. The Greggs made payments on the contract, either to plaintiff or the South Holland bank, to October, 1931, and being unable to continue the payments vacated the property in January, 1932. The note of plaintiff at the bank was fully paid, and on November 14, 1931, Waterman as trustee assigned the Gregg contract to plaintiff. Waterman testified that the bank did not require the execution of the warranty deed conveying the property to him as trustee, but that he took title as trustee at the request of plaintiff and that in holding the title he was acting only as a "dummy" for plaintiff.

When the property was vacated by the Greggs in January, 1932, plaintiff took possession of the premises and rented the house to a tenant and collected the rents. Subsequently plaintiff told the Greggs he wished to clear the title to the property and would release them from all liability on their contract if they would execute a quitclaim deed to the property; they did this, delivering the deed to plaintiff. Defendants claim that plaintiff, by doing these things, released the Greggs from all liability under their contract, and so released defendants from their obligations under the guaranty.

Plaintiff, appealing to this court, first asserts that the court allowed defendants to cross-examine plaintiff on matters beyond that on which he had testified in chief. Plaintiff in chief testified only as to the signatures on the guaranty and as to the amount due. Defendants had a right to cross-examine him as to all matters that might affect the writing upon which suit was brought. It is well settled that a witness may be cross-examined as to whatever goes to explain, modify or discredit his testimony in chief. Chicago City Ry. Co. v. Creech, 207 Ill., 400, 402-3. Cross-examination is for the purpose of ascertaining the truth, and the

latitude allowed for this purpose rests largely in the discretion of the trial court; where there has not been a clear abuse of discretion the judgment will not be reversed on this account, The People v. Miller, 342 Ill. 244, 252; Brennen v. Carterville Coal Co., 241 Ill., 610, 622.

One of the pleas of defendants alleged that plaintiff while acting as their agent violated his fiduciary relationship. The cross-examination was intended to develop his conduct in this respect. Moreover, in any case where the plaintiff himself is a witness, considerable latitude is allowed in cross-examination. It is always desirable upon a trial to develop all the facts so that the jury may be apprised of all the circumstances involved.

Plaintiff next complains that defendants presented one defense in their pleadings but by evidence presented another defense. By this plaintiff apparently means that defendants' plea alleged that the Gregg contract was forfeited in February, 1932, when plaintiff took possession of the premises for himself and rented them to a tenant, but defendants also introduced evidence that in 1935 plaintiff took from the Greggs a quitclaim deed to the property.

Plaintiff introduced some evidence that when he took possession of the premises in February, 1932, he was acting as the agent of defendants. Defendants introduced evidence that he was then acting for himself in taking possession and forfeiting the contract. The additional evidence of the transaction in 1935 between the Greggs and plaintiff whereby plaintiff took from them a quitclaim deed to the premises was merely cumulative and not another defense.

When plaintiff took possession of the premises in February, 1932, the Gregg contract was forfeited and the Greggs released from liability. First Nat. Securities Co. v. Ward, 275 Ill. App. 521, 527-8; 20 Corpus Juris, p. 14, sec. 10, and 27 R. C. L., p. 666, sec. 429. It is a well known rule that where the principal

Institute allowed for this purpose rests largely in the discretion of the trial court; where there has been a clear abuse of discretion the judgment will not be reversed on this account. The Pennie v. Miller, 245 Ill. 614, 622; Hansen v. Scottsville Coal Co., 241 Ill., 210, 220.

One of the pleas of defendants alleged that plaintiff acting as their agent violated his fiduciary relationship. The cross-examination was intended to develop this contract in this respect. However, in any case where the plaintiff himself is a witness, considerable latitude is allowed in cross-examination. It is always desirable upon a trial to develop all the facts so that the jury may be apprised of all the circumstances involved.

Plaintiff next contends that defendants breached some terms in their pleading but by evidence presented neither defense. By this plaintiff apparently means that defendants' plea alleged that the first contract was forfeited in February, 1928, when plaintiff took possession of the premises for himself and rented them to a tenant, but defendants also introduced evidence that in 1929 plaintiff took from the dredge a quitclaim deed to the premises. Plaintiff introduced some evidence that when he took possession of the premises in February, 1928, he was acting as the agent of defendants. Defendants introduced evidence that he was then acting for himself in taking possession and terminating the contract. The additional evidence of the transaction in 1929 between the dredge and plaintiff merely placed title from them a thirdwise back to the premises was merely cumulative and not another defense.

When plaintiff took possession of the premises in February, 1928, the dredge contract was terminated and the dredge relieved from liability. Fiser Inv. Corporation v. J. Hall, 270 Ill. App. 327, 329-9; 40 Cyc. 2nd Supp., p. 22, sec. 10, and 27 R. C. L., p. 668, sec. 429. It is a well known rule that where the principal

debtors are released from liability without the consent of the guarantors the guarantors also will be released. McCartney v. Ridgway, 160 Ill. 129, 160; Trotter v. Strong, 63 Ill. 272.

Complaint is made of an instruction given at the request of defendants which told the jury that if plaintiff became the owner of the contract in question in November, 1931, and that afterward the Greggs abandoned the premises and plaintiff collected the rents and later obtained from the Greggs a quitclaim deed, telling them they would be released from liability under the contract, and if the jury so found then defendants were discharged from liability under their guaranty. There was no reversible error in giving this instruction, especially in the light of other instructions. The 17th instruction told the jury that if they believed from all the evidence that plaintiff agreed with the Greggs for a consideration to release them from liability on the contract, and if such agreement was unknown to defendants, they must find them not guilty. It is a general rule of law that instructions are to be considered as a series, and, if taken as a whole they present the law correctly, there is no reversible error. Klofski v. Railroad Supply Co., 235 Ill. 146, 154.

The jury could properly find that plaintiff exercised acts of ownership of the property and released the Greggs, the original makers of the contract, from all liability. It follows, therefore, that defendants cannot be held liable upon their guaranty.

The judgment is proper and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

O'Connor, P. S., and Matchett, J., counsel.

ELLISTON.

The judgment is ripe and it is ordered.

that determinate amount be held liable upon quantum.

of contract, that all liability. It follows, therefore

measure of the contract, that all liability. It follows, therefore

of contract at the property and released the charge, the original

The jury could properly find that nominal exercises were

error. Ingleski v. Kilgore Supply Co., 290 Ill. 147, 154.

as a whole they present the case correctly, there is no reversible

that instructions are to be considered as a series, and, if taken

they must find them not guilty. It is a general rule of law

the contract, and it must appear to reasonable to reasonable,

the charge for a consideration to release them from liability on

it they believed from all the evidence that plaintiff agreed with

of other instructions. The 14th instruction told the jury that

slight error in giving this instruction, especially in the light

charged from liability under their verdict. There was no harm-

the contract, and if the jury so found then defendants were dis-

deed, telling them they would be released from liability under

located the route and later obtained from the dredge a quitclaim

ployee of defendants which told the jury that it plaintiff secur-

owner of the contract in question in November, 1931, and that

afterward the dredge abandoned the premises and plaintiff sur-

of defendants which told the jury that it plaintiff secure the

Complaint is made of an instruction given at the request

Dilworth, 190 Ill. App. 180; Section 2, Section, 40 Ill. 42.

39845

SYLVIA VRBA,
Appellee,

vs.

EMIL VENCLIK and ANNA VENCLIK,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

294 I.A. 602

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for plaintiff for $500, entered upon the verdict of a jury in an action for damages arising out of injuries to plaintiff when she fell on an icy ridge on the sidewalk in front of the store in which defendants had a meat market.

Defendants' store is at 6811 West Cermak Road in Berwyn, Illinois; January 25, 1935, at about 1:30 p. m., plaintiff was a customer in defendants' store; upon leaving the store, her arms full of bundles, she turned westward to go to her automobile and proceeded westerly in front of the store to a point three or four feet west of the entrance and about one and one-half to two feet away from the building, where she slipped on ice and fell; she was assisted by two men to the car belonging to one of them and was taken by him to the Berwyn hospital where an X-ray showed that she sustained a fracture of the lower fibia of the left leg; after the bone was set and her leg placed in a cast she was taken home and stayed in bed for about eight weeks; she was employed at the Western Electric Company and did not return to her work until May 8th.

Plaintiff testified that it was a nice cold day but that it had snowed in the morning; that the sidewalk in front of the store extended about eleven feet to the street; that as she left the store she carried packages and after walking three or four feet slipped on the ice; that after she fell she observed at this spot a water pipe stub for hose attachment extending about two feet above the sidewalk and projecting about three inches from the

39843

DISTRICT COURT,

Appellee,

vs.

EMIL VINCENIK and ANNA VINCENIK,

Appellants.

39413.A. 6052

IN THE DISTRICT COURT OF [illegible]

building; that beneath this stub, running straight across the sidewalk and all the way to the street, she observed a ridge of ice about an inch and a half high and eight or nine inches wide, covered with snow; that she did not see this ridge on the sidewalk as she came out of the store but only after she fell; that it was covered with snow and there was no snow on the other part of the sidewalk; she said she did not stumble but just slipped; she wore low heeled shoes at the time.

At the time plaintiff fell her father was sitting in the automobile awaiting her return and saw her slip and fall; he said he saw icicles on the water pipe stub and a streak of ice on the sidewalk about a half inch thick and eight inches wide all the way down to the curb from the building; that the ice was covered with just a little snow and could not be seen; that there was no snow on any other part of the sidewalk in front of the store. There were no other eye witnesses to the accident.

A sister of plaintiff also testified that the day of the accident was clear and cold and that it did not rain or snow the night before. Defendants and two of their witnesses testified that it rained and snowed the day and night before and rained and sleeted during the day of the accident; that the streets and sidewalks were covered with ice and snow and that this condition was widespread. One witness worked in defendants' store and testified that twice on the day of the accident he sprinkled salt on the snow in front of the store and scraped it - the last time about one o'clock, or about a half hour before the accident - and that after scraping there was still about a half inch thickness that he could not scrape off; that at this time the water stub for hose connection was not dripping. The weather report, introduced by defendants, rather supports the testimony for plaintiff and contradicts the version of defendants that it rained and snowed the night before and rained

and sleeted the day of the accident, and also concerning the condition of streets and sidewalks. It was for the jury to pass upon these conflicting questions of fact.

It is contended that there is no testimony of plaintiff "tripping" over any ridge of ice and snow as charged in her complaint, and therefore the allegations and proofs are inconsistent. We think the facts which the evidence tended to establish are in substantial accord with the averments of the complaint. But if it were otherwise, the contention of variance in a suit at law raised for the first time in this court comes too late, for had plaintiff's attention been called to the matter by a specific objection she could have amended her complaint. Carney v. Marquette Coal Mining Co., 260 Ill. 220, 225; Chicago City Ry. Co. v. McClain, 211 Ill. 589, 593-94.

There was sufficient evidence to go to the jury on the questions of whether water dripped from the pipe stub, ran across the sidewalk, froze, and became a hazard to pedestrians, causing plaintiff to fall, and whether defendants had knowledge of these conditions. Three other witnesses for plaintiff gave testimony tending to show knowledge by defendants that water had dripped from the pipe stub. They said that when they visited the defendants' store four days after the accident to make a purchase defendant Anna Venclik voluntarily took them outside the store, pointed to the pipe stub and said that it was still dripping and that she had told her husband to have it fixed, but that he did not do so. Minerva Johnson testified in behalf of defendants that four days after the accident she visited their store, saw the pipe stub dripping a little and told Mrs. Venclik, who then came out to look at it. Mr. Venclik said that on this day the pipe burst and the water was shut off in the basement; that on the day of the accident there was ice all over the sidewalks, but that he

and elected the day of the accident, and also excluding the evaluation of streets and sidewalks. It was for the jury to make these conflicting questions of fact.

It is contended that there is no testimony of slipping "tripping" over any ridge of ice and snow as charged in the complaint, and therefore the allegations are immaterial. We think the facts which the evidence tended to establish are in substantial accord with the averments of the complaint. But if it were otherwise, the conclusion of variance in a suit at law raised for the first time in this court came too late, for that question should have appeared per complaint. Chester v. Burroughs Coal Mining Co., 250 Ill. 280, 295; Ottawa City Tr. Co. v. Dreisle, 211 Ill. 280, 303-34.

There was sufficient evidence to go to the jury on the questions of whether water dripped from the pipe rack, ran across the sidewalk, froze, and became a danger to pedestrians, causing plaintiff to fall, and whether defendants had knowledge of these conditions. There were witnesses for plaintiff gave testimony tending to show knowledge on defendants part water had dripped from the pipe rack. They said that when they visited the defendants' store they often had occasion to walk a distance that was not easily ascertained in feet, but that is the pipe rack was pointed to the pipe rack and said that it was still dripping and not do so. Sidney Johnson testified in January of February that he had said ever something to have it fixed, but that is the pipe rack after the accident was visited their at re, ran the out to look at it. Mr. Vennik came out on the pipe burst and the water was cut off in the basement; that on the day of the accident there had all over the sidewalks, but that he

didn't see any ridges; that it was smooth.

Defendants contend that the trial court erred in permitting questions to be asked these witnesses as to these admissions and statements of Mrs. Venclik which were contradictory to her testimony on the trial, as being hearsay and not part of the res gestae. Where admissions are made by a party to a suit, such admissions are admissible against him. Van Meter v. Gurney, 240 Ill. App., 165, 188.

It is said there was no evidence that the icy condition of the sidewalk was caused by defendants and consequently notice of a dangerous condition is a prerequisite to defendants' liability; that there is no testimony on the part of plaintiff as to when or how this ice formed nor how long it had existed. In the cases cited by defendants which deal with notice, a municipality was the defendant and the questions were whether the icy condition of the sidewalk was such as to obstruct or prevent its being reasonably safe for travel, and whether this condition continued for such a length of time as to charge the City, in the exercise of reasonable care, with notice. In the instant case the streak of ice testified to extended all the way across the sidewalk to the curb from beneath the pipe stub, which was but three or four feet from the store entrance; the accident occurred at about 1:30 p. m.; there was testimony for defendants that the sidewalk had been scraped about a half hour before the accident, but apparently it was still in a more or less unsafe condition for passers-by and customers. These considerations, together with the admission by Mrs. Venclik of the leakage of water from the pipe stub were sufficient to go to the jury on the question of notice.

An abutting property owner is not liable for injuries resulting from snow and ice on the sidewalk in front of his premises where it came there by natural causes. However, when he maintains upon his premises a structure or device which causes an artificial dis-

charge and accumulation of water upon a public sidewalk, which by freezing will make the use of the sidewalk dangerous, he is guilty of negligence and will be held liable for injuries resulting therefrom. 43 C. J. 1107, sec. 1869; 13 R. C. L. 416, sec. 342; annotation 34 A. L. R. 409; 58 L. R. A. 321, 328 (note.) King v. Swanson, 216 Ill. App. 294, involved injuries received through slipping and falling on ice on the sidewalk in front of defendant's premises; the evidence tended to show that, while there was more or less ice on all of the sidewalk, there was a space four feet wide from defendant's premises to the curb which was much more slippery than the other portions of the sidewalk, and that this condition was caused by dragging large baskets of clothes between defendant's laundry and the curb; the court recognized the rule that mere slipperiness of a sidewalk caused by ice or snow, not accumulated so as to be an obstruction, is not such a defect as will make the city liable for damages, but held that this did not apply where defendant used the sidewalk in the conduct of his business and the injury resulted from the dangerous condition he created. See also the well considered opinion in Stith v. Newberry Co., 336 Mo. 467, 481-84, where water was discharged from an awning in front of defendant's store, froze upon the sidewalk and became dangerous to passers-by, the court holding that the facts there involved, which were in some respects similar to those before us, were for the jury to decide.

The trial court did not err in declining to take the case from the jury, but properly left to it the questions whether plaintiff showed that the icy ridge on the sidewalk was caused by the leakage of water from the pipe stub, and if so, whether defendants used reasonable care to keep the sidewalk in front of their premises in a reasonably safe condition. The jury found defendants guilty, and in the face of the sharply conflicting evidence we would not be justified in holding that the verdict is against the manifest weight of the evidence.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

charge and accumulation of water upon a public sidewalk, which by freezing will make the use of the sidewalk dangerous, is in reality of negligence and will be held liable for injuries resulting therefrom. 43 C. J. 1167, sec. 1244; 12 C. J. C. 818, sec. 949; annotation 34 A. L. R. 437; 36 L. R. A. 821, 825 (note.) See also Swanson, 216 Ill. App. 524, involved injuries received through slipping and falling on ice on the sidewalk in front of defendant's premises; the evidence tended to show that, while there was more or less ice on all of the sidewalk, there was a space four feet wide from defendant's premises to the curb which was much more slippery than the other portions of the sidewalk, and that this condition was caused by dripping large masses of clothes entering defendant's laundry and the curb; the court recognized the rule that mere slipperiness of a sidewalk caused by ice or snow, not accumulated so as to be an obstruction, is not such a defect as will make the city liable for damages, but held that this did not apply where defendant used the sidewalk in the conduct of his business and the injury resulted from the dangerous condition he created. See also the well considered opinion in Stein v. Dempsey Co., 226 Mo. App. 438-44, where water was intentionally run on sewing in front of defendant's store, froze upon the sidewalk and became dangerous to passers-by, the court holding that the trade bureau involved, whose duty was merely similar to those before us, were for the jury to decide.

The trial court did not err in declining to take the case from the jury, but properly left it to the reasonable opinion of the jury, to say whether the icy ridge on the sidewalk was caused by the leakage of water from the pipe etc., and if so, whether defendant used reasonable care to keep the sidewalk in front of their premises in a reasonably safe condition. The jury found defendants guilty, and in the face of the sharply conflicting evidence we would not be justified in saying that the verdict is against the manifest weight of the evidence.

The judgment is affirmed.

O'Connor, P. J., and Matchett, J., concur.

39866

ELI FRANKEL,
Appellee,

vs.

GOLDIE KOSLOW FRANKEL,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

294 I.A. 602

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree granting plaintiff a divorce and dismissing for want of equity defendant's counterclaim for separate maintenance. Plaintiff does not appear in this court to defend the decree.

Plaintiff's complaint alleged that on November 15, 1934, defendant had deserted and absented herself from him without reasonable cause and that the desertion persisted for more than one year. Defendant answered, denying that she had deserted but alleged that on the contrary plaintiff had deserted her. Defendant also filed a counterclaim asking for separate maintenance, in which she alleged wilful desertion of her by plaintiff without cause; that she was without employment, property or means of support. Plaintiff answered, denying generally the allegations of defendant made in her counterclaim.

The testimony of plaintiff as to the alleged desertion was indefinite and uncertain and the testimony of other witnesses was also confusing. The case should be retried so that the facts material to the issues can be clearly presented.

The decree is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

MCI MARINE,

Appellee,

vs.

COLBIA SOUTH MARINE,

Appellant.

294 I.A. 602

MR. JUSTICE MCCONNELL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree granting plaintiff a divorce and dismissing for want of equity defendant's counterclaim for temporary maintenance. Plaintiff does not appear to have asked to defend the decree.

Plaintiff's complaint alleged that on November 15, 1934, defendant did leave and abandon Marcart Iron and Steel Company's employ and that the desertion persisted for more than one year. Defendant answered, denying that she had deserted but alleged that on the contrary plaintiff had deserted her. Defendant also filed a counterclaim asking for separate maintenance, on which she alleged willful desertion of her by plaintiff without cause; that she was without employment, property or means of support. Plaintiff duly answered, denying generally the allegations of defendant made in her counterclaim.

The testimony of plaintiff as to the alleged desertion was indefinite and uncertain and the testimony of other witnesses was also confusing. The case should be retried as that the facts material to the issues can be clearly presented.

The decree is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

39159

BERTHA ARLT, Conservatrix of the Estate of EMIL ARLT, Insane,
Appellee,

vs.

CHICAGO MOTOR COACH COMPANY, a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 602

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries and upon trial by jury there was a verdict for plaintiff in the sum of $12,000, upon which the court, after denying motions of defendant for a new trial, for judgment notwithstanding the verdict, and in arrest, entered judgment.

Plaintiff's ward, Arlt, was injured August 15, 1934, at the intersection of Ashland avenue and Jackson boulevard in Chicago, when he came in contact with a bus of defendant operated by its servant. The complaint of plaintiff, which was filed January 11, 1935, is in four counts. The first charges negligence generally; the second that the motorman negligently failed to keep a lookout; the third (which was withdrawn) willful and wanton negligence; and the fourth that defendant disregarded an ordinance of the City of Chicago which provided that at intersections where traffic was controlled by special traffic signals or by police officers, operators of vehicles should yield the right of way to pedestrians crossing or who had started to cross the roadway on a "green" or "go" signal.

It is contended for reversal that Arlt was guilty of contributory negligence as a matter of law; that the verdict is against the manifest weight of the evidence; that the court erroneously permitted Arlt, an insane person, to be in the courtroom in the presence of the jury; that the court erred in refusing to permit

No. 12139

Estate of Emil Adolf Ingram,
deceased.

vs.

Petition for Letters of Administration,
Contestation,
Appellant.

In the Superior Court of the State of California, in and for the County of [illegible].

Estate of Emil Adolf Ingram, deceased.

Petition for Letters of Administration, Contestation, Appellant.

vs.

Petition for Letters of Administration, Contestation, Respondent.

In the Superior Court of the State of California, in and for the County of [illegible].

No. 12139

Estate of Emil Adolf Ingram,
deceased.

vs.

Petition for Letters of Administration,
Contestation,
Appellant.

In the Superior Court of the State of California, in and for the County of [illegible].

defendant to file an amended answer setting up certain ordinances of the City of Chicago and of the West Park Commissioners; in erroneously instructing the jury; and that the damages awarded were excessive.

It is insisted that there was a variance between the allegations of the complaint and the proof in that while the complaint averred that the motor bus of defendant negligently ran into, upon and against and came into collision with Arlt, the evidence tended to show that Arlt negligently walked into the side of the motor bus. Neither by objection to the introduction of evidence when offered nor by its motion to instruct the jury was this supposed variance specifically pointed out. We do not agree there was a variance, but if we assume there was the question was not raised in the trial court and may not for the first time be successfully presented in this court. (City of Joliet v. Johnson, 177 Ill. 181; Chicago City Ry. Co. v. McClain, 211 Ill. 594; Gascoigne v. Metropolitan El.Ry. Co., 239 Ill. 22; City of Chicago v. Bork, 227 Ill. 63; Carney v. Marquette Coal Mining Co., 260 Ill. 225, and Allegretti v. Murphy Miles Oil Co., 280 Ill. App. 390.)

The evidence shows without contradiction that Arlt at the time of trial was insane and defendant contends that the court erred in (over defendant's objection) permitting him to be brought into the courtroom and his injury (a mangled foot) to be exhibited to the jury. It does not appear the conduct of Arlt before the jury was unusual or designed to create prejudice. Attorney for defendant, in his argument, told the jury, "He (Arlt) demeaned himself after he got into the courtroom in a manner that would well become some of the lawyers." The question of the exhibition of the injury of a plaintiff to a jury is one resting in the sound discretion of the court. (Minus v. Friend, 360 Ill. 336; Barnstable v. Calandro, 270 Ill. App. 68.)

After the trial was concluded defendant presented a petition for leave to file an additional answer with six exhibits, which were in part certified ordinances of the City of Chicago transferring control of the portions of Jackson boulevard and Ashland avenue where the accident occurred, to the West Park Commissioners, and in part other ordinances of the West Park Commissioners accepting such control and jurisdiction. The additional answer averred that the ordinance of the City of Chicago was not applicable. The court denied the motion, and defendant contends that it should have been allowed under Section 46 of the Civil Practice Act. The ordinances were offered in support of a motion by defendant for judgment non obstante veredicto. The original answer of defendant did not raise this supposed defense and on the trial of the case no evidence was offered bearing upon that issue. The trial was ended. The pleadings might have been amended to conform to the evidence, but under any system of pleading amendments must be filed in apt time. Paragraph 4 of section 171 (43) of the Civil Practice act provides in substance that any ground of defense, whether affirmative or not, if not expressly stated in the pleadings, which would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. The courts hold that an additional plea after cause of action has gone to trial should not be allowed without showing reasonable excuse. (City of Chicago v. Cook, 204 Ill. 375; Willard v. Bristol, 251 Ill. App. 237; Tierney v. Sampsell, 172 Ill. App. 122.) Section 57 of the Evidence act requires the court to take judicial notice of the general ordinances of every municipal corporation, but the ordinances offered were special in their nature. This matter was within the discretion of the court. However, prior to the accident the West Park Commissioners had passed an identical ordinance to that set up in the complaint. This defendant admits in

its reply brief. Had its motion prevailed it would not be entitled to more than an amendment of the complaint, which is permissible after verdict.

By its request for leave to file this further answer defendant also sought for the first time to raise the contention that since it was a public utility and by statute subject to the order and control of the Illinois Commerce Commission (Ill. State Bar. Stats., 1937, chap. 111-2/3, sec. 8, p. 2250) it was not subject to the municipal ordinances and regulations of the City of Chicago. Defendant cites Village of Atwood v. C. I. & W. R. R. Co., 316 Ill. 425; Northern Trust Co. v. Chicago Rys. Co., 318 Ill. 402; City of Witt v. C. C. & St. L. Ry. Co., 324 Ill. 494; Chicago Motor Coach Co. v. City of Chicago, 337 Ill. 200-202; City of Geneseo v. Ill. No. Utilities Co., 363 Ill. 95.

The ordinance here involved is section 16 of article IV of the Uniform Traffic Code of the City of Chicago. It is not pointed out that the ordinance is in any way inconsistent with or repugnant to any particular provision of any state statute or any rule of the commerce commission. We do not understand that the state statute has deprived the City of Chicago of the power to enact ordinances providing for merely local rules regulating traffic on the streets. By the Act of June 29, 1929, (see Laws of 1929, pp. 653-654) the Legislature limits the power of the commerce commission in the regulation of speed within the limits of an incorporated city, village or town. This enactment was later than the Public Utility Act. In Tuttle v. Checker Taxi Co., 279 Ill. App. 455, this court held the traffic ordinances to be valid and not inconsistent with the Motor Vehicle Act. By the same reasoning we hold that the Uniform Traffic ordinances of the City of Chicago are valid as not inconsistent with the Public Utility Act and being only local regulation of traffic upon streets under police powers granted to

the City of Chicago.

Closely connected with this point is the further contention that the court erred in giving at the request of plaintiff instruction No. 3. The instruction in substance said that the traffic ordinance above named of the City of Chicago was in force. The instruction went on to say that if the jury, from a preponderance of the evidence, should find that the plaintiff's ward had started to cross the roadway on a green or "Go" signal and had left the curb and was on the crosswalk before the bus reached the crosswalk, and was both before and at the time of the injury in the exercise of ordinary care for his own safety, then it was the duty of the operator of the bus to yield the right of way to plaintiff's ward. Defendant says that the instruction was erroneous because there was no such ordinance in force and applicable, and cites Tuttle v. Checker Taxi Co., 274 Ill. App. 525. That contention we have already held to be without merit. Defendant also says the instruction was prejudicial for the reason that it gave the jury the notion, which they adopted, that even if Arlt saw the motorbus coming around the corner, or in the exercise of reasonable care should have seen it, all he had to do was to step off the curb into the crosswalk and that he would have the right of way and defendant would be negligent if it did not yield. This inference is not justified by the language of the instruction. Not only by the instruction itself (which did not direct a verdict) but also by several other instructions given by the court, the jury was told that plaintiff could not recover unless her ward, at the time of and before the injury, was in the exercise of due care.

The questions whether defendant was negligent, whether plaintiff's ward was in the exercise of due care, and whether the verdict is against the manifest weight of the evidence, require a careful consideration of the facts in the record. It is conceded

the City of Chicago.

Counsel commented also upon a point in the Instruction conference
tion that the court erred in giving it the refusal of Plaintiff's
Instruction No. 8. The instruction is subdivision well that the
Plaintiff recovered above amount of the bill of Exchange and it stated.
The instruction went on to say that if the jury, from a preponderance
of the evidence, should find that the Plaintiff's right had vested
to cross the roadway on a green or "Go" signal and had left the
curb and was on the crosswalk before the Two received the direc-
tion, and was left before and at the time of the injury in the
exercise of ordinary care for its own safety, then it was the duty
of the operator of the bus to yield the right of way to Plaintiff's
ward. Defendant says that the instruction was erroneous because
there was no such ordinance in force and effect, and cites
Taylor v. Chester Taxi Co., 274 Ill. App. 604. That decision
have already ruled by be without merit. Defendant also says the
instruction was prejudiced for the reason that it said the jury
the motion, unless they wanted, that when it said the defendant
could have seen it, but be was to be held all the same to
the crosswalk not just to avoid one since of any duty
would be negligent if it did not yield. This instruction is not
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other instructions given by the court, the jury was told that
it could not recover unless was used, at the time of any matter
the injury, was in the exercise of due care.

that plaintiff's ward was severely injured on the morning of August 16th at the intersection of these boulevards. Ashland avenue is 50 feet and Jackson boulevard 48 feet wide from curb to curb and both are paved with asphalt; on the east side of Ashland is a cement sidewalk 8 feet wide; on the south side of Jackson is a sidewalk 8 feet wide extending from curb line to building line. The intersection was controlled by traffic signals or "Stop" and "Go" lights; display of the green lights meant "go", of the red lights "stop." A diagram of defendant's bus is in evidence; it was an upper and lower deck; the upper deck would carry 37, the lower 18 passengers; the distance from the center line of the rear wheel to the door was about 11 feet 6 inches; total length of bus about 28 feet, height about 12 feet and its weight about 17,200 pounds. A photograph of the inside of the lower deck of the bus is also in evidence. It shows the seats for passengers on the lefthand side and just behind the driver's seat.

On this particular morning Morris Brown was the driver of the bus. Miss Pearl Gault, Attorney Felix Silverstein, Jacob Rechtner of Erie, Pa., and his 14 year old nephew were passengers in the lower deck. Brown, Rechtner, and Silverstein testify to the occurrence for ~~plaintiff~~ defendant. Miss Gault, Joseph Halford, a lithographer who was a pedestrian standing on the southeast corner of the intersection, and Sally Jasper and Juanita Williams, maids at work in a house on the southeast corner of the intersection, testified for plaintiff. All the witnesses agree that the military parade was passing at this time and moving toward the east on the south part of Jackson boulevard, occupying the center and the south side of the street, and that the parade about this time seemed to divide; a part of it was on the west, a part on the east side of the intersection. Defendant's bus moved north on Ashland avenue; its route required it should turn east into Jackson boulevard. Practically all the

witnesses agree that as it approached Jackson it stopped and waited the appearance of the green light. Silverstein, however, says it did not stop at all but that the green light was on and that it turned toward the east on Jackson without stopping. The other witnesses say it stopped and when the green light appeared started up, entering Jackson boulevard and turning toward the east. The estimates of the witnesses as to speed of the bus at this time varies from 3 to 15 miles an hour. Brown admits it was about 12 miles an hour. Silverstein says that Arlt walked to the curb and stepped from it just as the bus was passing and that he blindly stumbled into the side of the bus and was injured in that way. Brown, the driver, says he did not see the man before the accident. Rechtner and Gold give like testimony.

Silverstein says he saw the man walking north on Ashland boulevard; that at the east crosswalk at Jackson the man stepped off from the curb, took two or three steps and walked right into the side of the center of the bus; the witnesses agree that somebody yelled and that the driver stopped suddenly. Silverstein got up and looked through the window; the man was lying on the ground; the bus remained standing until the man was picked up by a Yellow cab. Silverstein said this Yellow cab pulled up between the curb and the bus; he says that when the man stepped out the bus was just completing its turn to the east, and that when he saw the man walking on the sidewalk the bus was just starting to make the turn; he says the man was walking north looking west and looking at the parade.

Halford, who seems to have been in the best position to observe, says he saw the man walking north and the bus approaching at the same time; that the man was in the crosswalk of Jackson boulevard on the east side; that he saw the driver of the bus, who was looking over his/shoulder northwest; that there was a break in
left

the parade; the bus was making a turn at the time and it struck the man; the man was out in the street, he says, about one-third way across when he was struck by the panel of the bus behind the front door; when the driver stopped the rear wheel of the bus was on the man's foot; he says he called to the driver to back off the injured man's foot; that he helped pick the man up and put him in the cab which came in a few seconds; the bus was then standing in the middle of the street; when he first observed the bus the man who got injured was 12 to 15 feet out in the street walking north and facing in that direction; he did not see him turn his head, didn't notice whether he looked to the right or to the left, but the man turned his head when he was hit; the man did not quicken his pace as he walked but continued walking until the time of impact; when the man was hit he spun around and fell on his right side.

Miss Gault, it seems, was the lady who screamed; she was on the bus but apparently at the time of the trial was confused as to the side on which she sat; she says she saw the man who was crossing the street before he was injured; she could not see how close the bus was to him when she first saw him; the man took a step forward and then back; she heard a thud which seemed to come from the right front door of the bus; she screamed and the driver stopped and got out of the bus; she says that when she heard the thud the man walking on the street was in the north lane of travel; she was also positive that just at the time of the accident the driver of the bus was looking over his left shoulder. This witness was much confused. Attorney for defendant on cross-examination produced a paper signed by her which apparently was in material respects contrary to the testimony given by her, and in which she expressed the opinion that the man who was injured was to blame for the accident; however, she said the paper was not in the same condition as when she signed it, and defendant did not offer it in evidence to impeach her testimony.

Sally Jasper, who worked in a building at the southeast corner of the intersection, says that she was on the second floor making up beds; that she saw the parade from the window looking west; Juanita Williams was with her; they looked up and she saw the bus and that a man had been hit; she estimates that the side of the bus was 12 to 15 feet from the south curb of Jackson boulevard; she says that in a few seconds a Yellow cab came; the cab was driven in about 3 feet from the curb and the injured man was put into it from the north door of the cab; the man was lying about where the center line of the bus was and in front of the rear wheel; there was two or three feet between the curb and the right side of the cab. Juanita Williams corroborates Sally Jasper as to the relative positions of the bus, the body of the injured man and the Yellow cab which took him away. She says the bus was standing about 12 to 15 feet from the south curb. Rechtner, on the other hand, says that when the motor bus stopped it was about 4 or 5 feet from the curb on the right hand side; he did not know who took the injured man away; he came from Erie, Pa., to testify and received $10 a day from defendant company and his expenses; he says he heard a thud and then heard a lady say, "I think someone hit you;" he looked out of the window after the bus stopped and saw the injured man put in the Yellow cab; as already pointed out, he agrees that the cab was driven between the body of the man and the south curb. A policeman testified that an impression of a hand appeared on the sideof the bus.

The evidence as above recited shows, we think without doubt, that the question of whether the driver of defendant's bus was negligent was a question for the jury. Indeed, we think a preponderance of the evidence indicates that he was in fact negligent. He admits that he did not see the injured man before the impact and two witnesses testify that he was looking in another direction. In the last analysis the controlling question of fact in the case is

whether Arlt at the time in question was in the exercise of due care. Under the law of this state, contrary to that which exists in many jurisdictions, the burden of proving due care is upon the plaintiff, but the question of fact is for the decision of the jury. We think there is some evidence in this record indicating due care upon the part of plaintiff's ward. One of the witnesses says that he looked toward the north. Defendant's witness Silverstein says that before crossing he looked toward the west. The jury, we think, could reasonably believe that when he reached the curb the green light was displayed, indicating that he had the right of way across the intersection. The only direct evidence tending to show that he stumbled into the bus is that of Silverstein, who is positively contradicted by Halford who was in a much better position to observe the whole situation. A clear preponderance of the evidence we think indicates that the accident occurred when Arlt was 1/3 across the street and under circumstances indicating that he had the right of way. If so, we do not think it could be said he was negligent in relying upon that right. If a pedestrian at a crossing of this kind may not rely upon the appearance of the light which invites him to cross, such intersections would be indeed dangerous. Plewe v. Chicago Motor Coach Co., 283 Ill. App. 57; Mahan v. Richardson, 284 Ill. App. 493. This also seems to be the view of courts of other jurisdictions. Jacobson v. Palma, 115 Pa. Superior court, 401; Newman v. Protective Motor Service Co., 298 Pa. 509; Villiger v. Yellow Cab Co., 309 Pa. 213; American Ice Co. v. Moorehead, 66 Fed. (2nd) 792; Baumann v. Eva-Caroline Home Laundry Co., 213 Wis. 78; Panitz v. Webb, 151 Md. 639; Salomon v. Meyer, 1 Cal. (2d Series) 13; Pinello v. Taylor, 128 Cal. App. 512; Yee v. Chatley Cabs, Inc., Court of Appeals (La. 1935) 158 So. 261.

Defendant finally contends that the damages allowed are excessive. The evidence for plaintiff tended to show that the

left foot of plaintiff's ward was badly crushed, the skin and tissue on top of the foot torn loose from the ankle on the inner surface down to the great toe. There was a fracture of one of the metatarsal bones and the first two or three metatarsal bones were exposed on the under side. The County Hospital record shows that when Arlt entered that institution after the injury the foot was swollen, the soft tissues on the inside were lacerated or torn away; that the tendons which ran alongside the medial portion were exposed, involving the bones of the inside of the foot, the metatarsal and phalangeal bones. At that time the lateral, the outside of the foot, had apparently been infected and pus had accumulated. He was afterward taken from the County hospital to Dunning where the infection developed into osteomyelitis and the bones of the foot became ankylosed. His foot at times seemed to heal but this was only apparent. At the time of the trial the foot had healed but it was turned in and without motion. Much of the foot tissue had been lost; the foot was turned in toward the mid-line of the body and was contracted; he has never been able to walk on the foot. The evidence shows that Arlt had seen service in the army; that while there he was infected with syphilis which was not cured. He was discharged for that reason. There was medical testimony to the effect that this disease might be revived by an injury such as that which was here received. The medical testimony is to the effect that the duration of his life will probably not be more than 3½ years. The question of damages was for the jury and on this evidence we find it impossible to say that the verdict is excessive. It is therefore affirmed.

AFFIRMED.

O'Connor, P. J., concurs.

McSurely, J., dissents. See next page.

39159

MR. JUSTICE McSURELY Dissenting: In my opinion Arlt in walking blindly into the side of the coach was guilty of contributory negligence, and the verdict of the jury in that respect is against the manifest weight of the evidence.

30138

39631

BERTHA ZISTER, Administratrix of the Estate of ANTHONY M. ZISTER, Deceased, Appellee,

vs.

WILLIAM E. POLLACK et al., Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 602

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On February 21, 1930, the administratrix filed a complaint in an action on the case under the statute for negligence resulting in the death of her intestate. She named as defendants William Pollack, Richard Pollack, Joel S. Benjamin and Nemci Benjamin. There was a judgment on the pleadings in favor of defendants which, upon appeal to this court, Zister v. Pollack, 262 Ill. App. 170, was reversed and the cause remanded. Upon trial by jury the plaintiff at the close of evidence voluntarily dismissed as to Joel S. Benjamin, Nemci Benjamin, and Richard Pollack. The jury returned a verdict in favor of plaintiff against defendant William E. Pollack, assessed damages at the sum of $5000, and the court, overruling motions for a new trial and in arrest, entered judgment for that amount, and William E. Pollack brings this appeal.

It is urged for reversal that the judgment is against the manifest weight of the evidence; that the court erred in refusing to direct a verdict for defendant William E. Pollack at the close of all the evidence; that it erred in its rulings on the admission of evidence and in the giving and refusing of instructions.

It is undisputed that plaintiff's intestate died on February 24, 1929, as a result of injuries received February 16, 1929, at or near the intersection of Lincoln avenue with Wellington street, Chicago. Lincoln avenue extends northwest and southeast. Wellington street extends in an eastern and western direction. The accident occurred at about 6:30 p. m. It was just getting dark and

MARTHA SIMPSON, Administratrix of the
Estate of LEROY B. SIMPSON, Deceased,
Appellee,

vs.

VILLIAM E. POLLACK et al.,
Appellants.

No. 10,[illegible] Abstract Opinion on file under [illegible].

On February 21, 1930, the Administratrix filed a complaint in an action on the case under the statute for negligence resulting in the death of her intestate. She named as defendants William Pollack, Richard Pollack, Joel E. Bentzin and Ernest Bentzin. There was a judgment on the pleadings in favor of defendants Pollack, upon appeal to this court, Dieter v. Pollack, 208 Ill. App. 178, was reversed and the cause remanded. Upon trial by jury the plaintiff at the close of evidence voluntarily dismissed as to Joel E. Bentzin, Ernest Bentzin, and Richard Pollack. The jury returned a verdict in favor of plaintiff against defendant William E. Pollack assessed damages at the sum of $5000, and the court, overruling motions for a new trial and in arrest, entered judgment for that amount, and William E. Pollack prays this appeal.

It is urged for reversal that the judgment is against the manifest weight of the evidence; that the court erred in refusing to direct a verdict for defendant William E. Pollack at the close of all the evidence; that it erred in its rulings on the admission of evidence and in the giving and refusing of instructions.

It is undisputed that plaintiff's intestate died on February 21, 1930, as a result of injuries received February 19, 1930, at or near the intersection of Division avenue with Halsted street, Chicago. Division avenue extends northeast and southwest. Wellington street extends in an eastern and western direction. The accident occurred at about 6:30 p. m. It was June daylight time and

the street was lighted. There was a double street car track in Lincoln avenue, north bound cars running over the east tracks and south bound over the west tracks. There had been snow which a snow plow had removed from the center of the street, and in the center where the traffic ran the street was dry, but on the east side of the street snow and ice were piled up as high as the curb. The street at the point in question was 42 feet wide between the curbs. The distance from the first street rail to the curb was 14 feet on each side. The distance between the center of the two tracks was 10 feet, and from rail to rail of the street car tracks was 5 feet. It was about 3 feet between the two inner tracks. The roadbed was about 28 feet wide. On the east side of Lincoln avenue stood the Gainer and Kohler Furniture store, which was about 126 feet south of Southport avenue. There were electric light poles along Lincoln avenue and also a trolley pole. There was a trolley pole 91 feet north of the corner on the east side of the street. The deceased, Mrs. Ruth Gries and her 4 year old daughter Jeanette had visited this furniture store. They came out on the sidewalk of Lincoln avenue intending to cross to the west side of the street. The defendant, William Pollack, now a lawyer, was then a student at Northwestern university. There was a basket-ball game at the University on the evening in question, and after dinner, some time near 6:00 p. m., Pollack, using a 1926 Stearns automobile, drove to the home of Agnes Erickson, then also a student at the University, but now Mrs. Ruben Anderson. She was to accompany Mr. Pollack to the basket-ball game; they drove northwest on Lincoln avenue; just preceding them was a Chevrolet car driven in the same direction by Joel Benjamin; his wife Nemci was with him and sat in the back seat; there were also children in the automobile; as they approached the point where deceased received his injury, Mr. Pollack decided to pass the Chevrolet car, which was going at a speed of about 12

miles an hour, and throwing some mud on his windshield. He did not blow his horn or give other indication that he was about to pass, but drove by on the right. Mrs. Gries testifies that he drove his automobile up onto the curb; she says she, the deceased and her daughter Jeanette were about 6 inches back from the curbstone; that deceased was holding Jeanette's left hand with his right hand; that the Pollack car, as it passed the Chevrolet, swerved to the right, "shot right out from behind the car on the sidewalk" and "went at an angle from the tracks toward the sidewalk, over the curb and struck my daughter and the man and knocked them in the air, and then turned back in the street." When she saw the Pollack car again it was about 75 feet from where they were hit and parked at an angle on the east side of the street; she says the little girl and the man were thrown quite aways in the air, about 4 feet, he still holding her hand.

Benjamin testifies that he was driving north toward his home, straddling the east rail of the car track; that the Pollack car passed him to the right and struck the right front wheel of his car; that as he approached the point of the accident he saw a man and a little girl standing on the sidewalk together; that his car did not strike the man at any time; that he did not see the Pollack car strike the man on the sidewalk; he saw the fender of Pollack's car strike the man and throw him to the side of the street; he saw the man go off toward the west or left; his own car did not strike the man at any time; no part of the man's body lighted on his car; he saw the man in the air but did not see the striking of the man by the car; after the accident his car was on the west side of the street and struck the Buenzow car with the fender and bumper; Zister was under the Buenzow car; Benjamin did not go to the hospital; his car struck Pollack's car twice; he heard a crack on the back ~~next~~ and "next time" he was struck on the right fender and

Pollack was going around him; he said he heard that his attorneys, Beebe and Essington, had withdrawn from his case, and he had not employed Donaghy to represent him; however he had been at Donaghy's office two or three times and he was there the morning of the trial "to give the deposition;" he had arranged to hire Mr. Donaghy if Mr. Beebe dropped out; at the time of the accident he had his brakes on the car and could stop it in from 2 to 4 feet; when the Pollack car struck his, Pollack was to the right between the car and the right hand curbstone; Benjamin said he saw the man and the girl before the Pollack car started to pass him; they were standing on the curbstone on the sidewalk; they were not moving fast when he first saw them; he did not see them leave the curbstone to start across the street; his car, he thought, might have been 20 or 30 feet from the man and girl on the sidewalk when he first knew the Pollack car was passing him; he was about 75 to 80 feet away when he last saw them; after that he never saw the man and girl until he saw the man in the air; at that time the Pollack car was already past when he saw the man in the air; the Pollack car was about a half car length ahead. Again he said when he first saw the Pollack car passing him the bumper of it was half way at the middle of his car; at that time he did not see the people on the sidewalk, and the Pollack car was then about 7 or 8 feet away from his car; the next thing he saw was when the man went in the air and the Pollack car was then already past -- was clear past his car, just about passing his car; he says:

> "I couldn't see the back of the Pollack car at the time I saw the man in the air, he was just passing me. I am saying that when I saw the car was turning, that car passed me a little, I didn't look much about it, struck me and then at the same time it struck the man too, the man and me at the same time. I saw him strike the man."

Pollack's left bumper, Benjamin says, came together with his right side fender, and the front wheel and front fender on his car were broken; he did not know whether Mr. Pollack's car was damaged, but

some part of the left side of it hit the right side of his car, and at the time they came together was the time he saw the body of the man in the air; he denies that the body was riding on his bumper, and says it was not on the left hand side of the bumper with the overcoat caught on it; he went over to the curbstone on the west side of the street with his car, and before he got there he says, "I collided head on with another automobile going southeast on the southeast bound car tracks;" the bumpers collided and the body of Zister was under Buenzow's car; he was almost under both cars, but his overcoat was stuck in Mr. Buenzow's car; he says, "My left front wheel was touching the curbstone in a half way angle with the curb; Mr. Buenzow's car was straight southeast at the curb." A nephew repaired Benjamin's car; he did not take it to a regular shop; he says the front axle was bent, the right fender broken and the front light on the left side and the right fender at the front end on the side also. The radiator and the bumpers were bent. He did not examine the Pollack car; he says he did not see the Pollack car up on the sidewalk, and that it was not on the sidewalk at any time so far as he knows; from the first time he saw the Pollack car until the last time he saw it, it was always on the street between the curbstones; he does not know whether the man he saw on the sidewalk is the same man that was finally found under the bumper; a garageman towed his car away but he does not remember his name; he, Benjamin, did not get out of his car at all and stayed in it about 10 or 20 minutes; he went to the police station and made a written statement but does not remember whether he signed it; he remembered giving a deposition which stated that there were three people standing on the sidewalk close to the street, and he then said the same car that struck him threw the man on the left side of the street; he saw the car "that struck another man that was standing with the

girl, and threw him in the air like an overcoat." He says that at that time he answered that the other automobile, when it hit the man, was on the sidewalk coming toward him; he did not remember saying at the inquest that his car touched Zister, nor that Zister was in front of his automobile; as he approached the scene of the accident he did not slacken his speed although he saw the little girl attempting to pull away or run away from the man; he did not remember stating at the inquest that he just stopped because he saw the little girl wanted to run and the man held her, and that was the time he stopped; nor did he remember saying at the inquest that he did not know it was a machine that hit him until he looked at his front wheel. The coroner's inquest was only a few days after the collision and he does not remember what he said there. He says, "Pollack's automobile went straight down Lincoln avenue after it hit me;" he says he, the witness, went over to the wrong side of the street because he was struck or pushed from the right side of it; he says, "I didn't see the man or girl on the sidewalk or in the street in such a position to cause me to put on my brakes and start to stop my car. There was no reason for me to put on my brakes as far as anything I saw was concerned;" he also said that Mr. Beebe had been his attorney for seven years and that he never employed Mr. Donaghy.

Mrs. Ruth Gries says that she and her daughter Jeanette (4 years of age) on the evening in question were at the furniture store which was about 175 feet from Wellington street; that they "came to the sidewalk and walked toward the curb;" that she saw the Benjamin and Pollack cars, the Pollack car when it was 150 feet away and the Benjamin car about 75 feet away; that the Pollack car "came out and made a swerve toward the curb and came up on the sidewalk;" that she jumped back to tell "Mr. Zister and the little girl to get out of the way," and "as I stepped back, he hit them with the

right front and they flew up in the air toward the west;" she did not notice the Benjamin car at the time the Pollack car struck; she screamed and closed her eyes; she says the Pollack car was going 35 or 40 miles an hour, and that it went about 75 feet after it struck the people. After the accident Zister was lying on the west side of the street. On cross-examination she said that she, Zister and the little girl were about to cross the street but had not left the sidewalk, and that they were about 6 inches back of the curbstone; Zister was alongside of her to her right and the little girl was to the right of him, he holding the girl's left hand with his right; she says, "The car went at an angle from the tracks toward the sidewalk, over the curb and struck my daughter and the man and knocked them in the air and then turned back in the street; he turned right back in the street;" she did not see the Pollack car hit the Benjamin car as it came around its side; the little girl and the man were thrown about 4 feet in the air; she did not see the Benjamin car collide "head on" with another car; as far as she knew that did not happen. The body of Zister lay close to the curb on the west side of the street; the little girl lay with her face down on the sidewalk and Zister on top of her neck to neck; she didn't notice Benjamin's or Buenzow's car and did not know they collided; she didn't know whether Zister's body was on the street "between" the curbstone or up on the sidewalk; Mr. Zister had an overcoat, but she did not notice whether it was tangled up in the bumper of either car; she did not see another car with a man lying on its bumper.

Mr. Howard, a printer, who was walking home with his wife south on Lincoln avenue, says that he heard a woman scream and heard a crash; that he turned around and the first thing he saw was Zister hanging onto the bumper of the Chevrolet car, which

which was facing toward the curbing on the west side of the street; that he was hanging there and his overcoat was entangled in the bumper; he (the witness) disentangled the overcoat, moved the machine and got Zister loose from the bumper; he heard Zister ask how the little girl was; Zister's leg was broken, and he was put in a Yellow cab and taken to the hospital; Howard rode with him, standing on the running board.

Mrs. Howard testified that she heard a terrible crash and screaming and turning to see what the excitement was, saw a man hanging onto the front end of a car; that the man lost his grip on the bumper and fell, and his head was pretty close to the curb, so the car was just off it. A crowd collected and she went home; she says she notice the little girl after the accident out in the crowd hollering; that she was just standing and walking around not in any one special place, and she thinks the girl "was rather out of her head."

Officer Schroeder, who made the police report of the accident, testified that he went over to make a pull at his box at 6:45; that a Yellow cab stopped and informed him that an injured man was there; he saw the Chevrolet and Buenzow car which was going south on the west side of Lincoln avenue; both cars were wrecked and had to be pushed and towed away; he also testifies that the Stearns Knight was about 35 or 40 feet north from where the accident was supposed to have happened, on the east side of the street, facing north. The officer got into the Pollack car and drove it over to the station to test its brakes, which, he says, he found O. K. The officer also says there was no dent or damage on the Pollack car, that it was not scratched up or broken in any way.

Arthur C. Bartz, who was walking north on Lincoln avenue at the time in question, says he heard a crash and that when he got there the man was lying on the west side of the street, about 10

feet from the gutter with his leg broken; he says, "We put him in a Yellow cab and ran him to the hospital. I did not hear more than one crash that night."

Mrs. Anna Lutter on the evening in question was riding south on Lincoln avenue in a car driven by her nephew, William Buenzow. She says it was not really dark but the lights were lit; that they were going south on the west side of Lincoln avenue, about 8 feet from the curb and going from 15 to 20 miles an hour; she says as they were coming along, going south, the first thing she knew was "that a car with a man on its bumper ran into our car;" she says this car was about 8 feet from them when she first saw it; that the car came in contact with the car in which she was riding; she does not know who was driving it, what kind of a car it was or how fast it was going, nor what part of it came in contact with the car in which she was riding; that this car that bumped them was headed north and the bumper of the car in which she was riding was bent by the contact; however, they drove home in it that night and also went to the police station; that at the inquest she thinks she testified that "it happened so quick that all I said was, 'Oh, Bill,' and they were on us."

It appearing that William Buenzow, Mrs. Lutter's nephew, was deceased, his evidence as given at the coroner's inquest was read and tends to corroborate the testimony of his aunt; he said that while he was driving south, suddenly a machine with the deceased on the bumper, came right toward his car; that he stepped on the brake and turned to the right, and there was a crash; that a man then came from the sidewalk, picked the man up and put him in a Yellow cab and took him away; he is positive that the man was lying on the bumper of the machine driven by Benjamin; he said he first noticed the car coming toward him when it was about 8 or 10 feet away; that his car was straddling the outside rail going

15 to 20 miles an hour; the right fender of the Benjamin car bumped his left fender, though he tried to swerve to the right to the sidewalk; his left bumper by the spring was struck by this car; the collision occurred about the middle of the block; he says he noticed that the right front wheel of the Benjamin car was bent, but whether by reason of his own car coming together with it he does not know; a lot of cars stopped at the place of the accident; he says the bumper on his car was bent and the shackle bolt through the spring damaged; he took it to a parking place and came back to the scene of the accident; he went to the police station with the officer and there saw Benjamin, Pollack and Miss Erickson.

Defendant Pollack said he was driving in a northwesterly direction, Mrs. Anderson (then Miss Erickson) sitting in the front seat by him; that Benjamin's car was going rather slowly and each time it hit a bump the mud from the street was splattered on his windshield, so he decided to pull out from behind the Benjamin car and drive in the lane to the right; Benjamin, he says, was in the car tracks, his car straddling the east rail of the north bound car track. He turned from behind Benjamin at about 60 feet north of the intersection of Wellington, Southport and Lincoln, a three-way intersection, and was driving in the right hand lane. He was accelerating his speed as Benjamin had been going only about 12 miles an hour; he says that about 175 feet north of the intersection of Wellington and Southport he noticed a man and a little girl; that the man was in a position adjacent to the east rail of the north bound car tracks; if he wasn't standing on the rail he was not more than 6 inches away from it; there was a little girl with the man who had apparently tried to break away from him; the man was holding her right hand; she was on his right side. Pollack says that when he saw the man he was driving his Stearns car in the right hand lane and adjusted his position slightly to the right;

he did not swerve, in order to give the man as much clearance as possible. He says:

"I passed this man. He was on my left, a man holding this girl by the arm. I did not come in contact with him in any way at all? When I passed him he was, about, I should judge, three feet to my left. I had passed him, and at that time I was in front of Mr. Benjamin's car. I do not mean in front, but to the side--- I was in a position that I was in front of his car, to the right; that is, the car was slightly to the rear of mine at that time. I had passed him already, but, of course, I was still in this westerly track of Lincoln avenue when he was on the car track."

"westerly" is obviously a misprint for easterly.

Defendant Pollack further testified that after he had proceeded 10 or 20 feet he heard a scream and a crash; that he immediately stopped his automobile, pulled up to the side of the street and went back to see what had happened; that when he got back he saw the man who had been standing with the little girl; he was on the bumper of the Chevrolet car - that is, the Benjamin car - and some men were taking him off the bumper and laying him on the street; the Benjamin car at that time was on the west side of Lincoln avenue, facing diagonally toward the curbstone. Pollack says that his car was not damaged or scratched in any way. He did not have any collision on the street with anyone at all; they all went to the police station where statements were taken; he had been driving a car about four years; his eyesight and hearing were good; he was perfectly sober and in control of his faculties; he says he never tried to see how fast the Stearns Knight would go; the fastest he had ever driven it was 45 to 50 miles an hour; on this particular evening he never exceeded 20 miles an hour; he says he never went over the sidewalk.

Mrs. Anderson testified that she saw a woman standing on the sidewalk on the east side of the street; that just as they passed the Benjamin car she noticed a man with a little girl on the right hand side of the car tracks; that when they had driven north a little bit there was a crash; she looked to the left and

there was a collision on the opposite side of the street; she said that the Pollack car did not go over the curbstone; that the Pollack car passed the man and the girl about 5 or 6 feet away from them, and that they were perfectly safe so far as that car was concerned; that the Pollack car did not hit anyone or have any collision or receive any damage; however, she did not get out to look at the car. On cross-examination she said that when at the inquest she was asked whether the Pollack car went up over the curbstone, she answered, "I don't remember. It must have. It seems to me there was a lot of snow there over the curbstone. I don't know if it went over or not." Also, that when asked at the inquest: "Q. You don't remember whether you had crossed over the curbstone or not, Miss Erickson?" she answered, "No, I do not. I could not say that because I am sure it was covered with snow." She also said that she did not remember whether she said at the inquest that the snow on the right side of the street was packed and that the wheels of the Pollack car went entirely up on the packed space when it went around the Benjamin car; she was positive that when she heard the creash the car in which she was riding had passed the Benjamin car. She admits that at the inquest she said they had passed the Benjamin car when she heard the crash but not the entire body of the Pollack car. "We were not entirely past him because we were just a few feet ahead of him."

The plaintiff states his theory as follows:

"It was, and is, plaintiff's theory that decedent, Mrs. Gries and her daughter (the latter's hand being held by decedent) left a store on the east side of Lincoln avenue and were still upon the sidewalk when defendant's car came onto the sidewalk, and on its way back to the street struck decedent, throwing him to the opposite side of the street and causing him to finally land between Mr. Benjamin's car and another automobile which had been proceeding in a southeasterly direction.

It is plaintiff's further contention ******that when defendant turned his automobile to the right from the rear of Mr. Benjamin's car in an attempt to pass up and get ahead of Mr. Benjamin's car, his automobile struck and went over the icy portion of the

there was a collision on the opposite side of the street; one mail
that the Pollock car did not go over the pedestrians; that the fol-
lace car passed the car and the jit about 2 or 3 feet away from
them, and that they were particularly safe so far as that car was
concerned; that the Pollock car did not hit anyone or have any
collision or receive any damage; however, she did not get out to
look at the car. On cross-examination the mail that when at the
instant she was asked whether the Pollock car went up over the
curbstone, she answered, "I don't remember. It must have. It
seems to me there was a lot of snow there over the curbstone. I
don't know if it went over or not." Also, that when asked if the
judgment: "Q. You don't remember whether you had crossed over the
curbstone or not, Miss Ericsson?" she answered, "No, I do not. I
could not say that because I am sure it was covered with snow."
She also said that she did not remember whether she felt the
impact that the door on the right side of the street car passed
and that the wheels of the Pollock car were entirely on the
paved space when it went around the Washington car; who the peti-
tive that when she heard the crash the car in which she was riding
had passed the Washington car. She admits that at the instant she
said they had passed the Washington car that she could not see
not the entire body of the Pollock car. "We were not entirely past
him because we were just a few feet ahead of him."

The plaintiff states his theory as follows:

"It was," said he, plaintiff's theory that happened, was.

street to the right of the tracks and between the tracks and the curb; that the ice and snow on the street extended to the curb and was in height about even with that of the curb itself; that apparently realizing that his automobile passed or was passing the curb line, defendant turned his wheels abruptly to the left in order to go back onto the street, and as he so turned and before his automobile was back on the street, struck the decedent, throwing him toward the middle or opposite side of the street, into the path of Mr. Benjamin's car. It is plaintiff's contention that decedent was struck by defendant's automobile when it was on its way back to the street, after it had passed the curb line, and not as defendant endeavors to have it appear."

There are many facts which we could wish to know concerning which evidence does not appear in this record. Some of the evidence from the witnesses who have knowledge is so uncertain and contradictory as to be of little value. At the close of the plaintiff's evidence the attorney for defendant Benjamin made a motion in his behalf for an instructed verdict in his favor, which the court denied. At the close of all the evidence the plaintiff voluntarily dismissed as to Benjamin. We are thus deprived of the benefit of the views of the jury as to his part in this unfortunate transaction. We regret this circumstance. The theory of plaintiff as above stated is, we cannot doubt, against the manifest weight of the evidence. It rests almost entirely on the evidence of Mrs. Ruth Gries, whose daughter was injured at the same time as was Zister, and who quite naturally was distracted by this accident to her friend and child. She is contradicted by Pollack, by Mrs. Anderson, and also by Benjamin, who also contradicts practically all the other witnesses in the case. We do not overlook Mrs. Anderson's admissions as to the wheels of Pollack's automobile going up on the packed snow to the curb, but this one fact can hardly be said to fully corroborate the statements of Mrs. Gries that the Pollack car ran up on the sidewalk, then turned toward the west, striking Zister and Jeanette and throwing them across the street. Her statement seems to set forth a physical improbability quite inconsistent with Benjamin's description of what occurred.

We do not question Mrs. Gries' desire to relate the circumstances as she now recalls them, but it is not possible to accept her story because of the undisputed fact that both Zister and her little girl were thrown practically at right angles to the west side of the street. She says that Zister was hit by the right bumper of Pollack's car. That he could thus be thrown to the west and across the street is contrary to universal experience. It is also contrary to the averments of the original and amended declarations, every count of which alleged that both the Pollack car and the Benjamin car struck the deceased. One of the counts alleges that Zister was standing on the sidewalk when struck; two of them that he was standing on the east side of the street. As contradicting both Mrs. Gries and Benjamin is the undisputed fact which appears in evidence, that defendant Pollack's car bore no evidence whatever of a collision. Because of the inherent improbability of plaintiff's evidence, because it is contradicted by the undisputed physical facts as well as by the testimony of disinterested and competent witnesses, we are constrained to hold that the verdict of the jury is against the manifest weight of the evidence. Defendant argues at length that the court erred in its ruling upon the admission of evidence and the giving of instructions, but in view of our conclusion as above it will be sufficient to say that in neither respect do we find reversible error in the record.

The judgment is reversed and the cause is remanded for another trial.

REVERSED AND REMANDED.

McSurely, J., concurs.

O'Connor, P. J., dissents.

39675

FRANCES KRAL,
Appellee,

vs.

ANTONIE KULICEK,
Appellant.

JOHN O. SYKORA,
Appellee,

~~vs.~~ and

JOSEPH DORT,
Appellant, appellee

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

294 I.A. 602

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

August 16, 1934, Frances Kral filed her bill of interpleader against Mrs. Antonie Kulicek and John O. Sykora. She averred the execution by plaintiff on July 28, 1919, of a trust deed to secure her note for $5000, due 5 years from date, to the order of Mrs. Kulicek and her husband Joseph, now deceased; the extension of the time for payment twice by agreement; that the principal note and one interest coupon for $150 fell due July 28, 1934; that she was willing to pay the same but defendants each claimed the amount due, namely $5150. She deposited the money with the clerk of the court and prayed defendants might be required to interplead.

John O. Sykora answered, disclaiming. Mrs. Kulicek answered, asserting she was the owner. Joseph Dort intervening, claimed to be the owner as an innocent purchaser for value from Sykora on October 8, 1931. He charged plaintiff and Mrs. Kulicek were in collusion and filed a counterclaim to foreclose, which plaintiff and Mrs. Kulicek answered, denying its equity. The cause was put at issue and referred to a master, who took the evidence and reported (overruling objections) that Joseph Dort was the owner. The cause was heard on exceptions to the report which were overruled, and after

TRACIE HALL,
Appellee,

vs.

AMERICA MAILCAR,
Appellant.

JOSE D. ESTORA,
Appellee,

vs.

JOSEPH DOLT,
Appellant.

29411.A. 603

MR. JUSTICE MACOMBER DELIVERED THE OPINION OF THE COURT.

August 16, 1934, Frances Hall filed her bill of interpleader against Mrs. America Mailcar and John O. Estora. She averred the execution by plaintiff on July 24, 1919, of a trust deed to secure payment of a note for $2000, due 5 years from date, to the order of Mrs. Estora and her husband Joseph, now deceased; the extension of the time for payment twice by agreement; that the principal note and the interest coupon for $150 fell due July 24, 1924; that she was willing to pay the same but defendants each claimed the amount due, namely $2150. One demanded the money with the clerk of the court and the other demanded the money with the owner. Joseph Hall intervened, claiming to be entitled to the money. Mrs. Mailcar answered, admitting she was the owner. Joseph Hall intervened, claiming to be entitled to the money. Mrs. Mailcar answered, admitting she was the owner. She averred that on December 8, 1923. He owned plaintiff was sue, Mailcar came to Chicago and filed a counterclaim to foreclose, which foreclosure was later dismissed, leaving its equity. The cause was set at issue and referred to a master, who took the evidence and reported (pursuing objections) that Joseph Hall was the owner. The cause was heard on exceptions to the report which were overruled, and after

striking the counterclaim the chancellor entered a decree in conformity with the recommendation of the master, from which Mrs. Kulicek appeals. It is urged that the decree is against the evidence and contrary to law.

The record presents the usual incidents of family controversy. A daughter of plaintiff is married to a son of Mrs. Kulicek. John O. Sykora is the son-in-law of Mrs. Kulicek, whom he calls "Grandma." A daughter-in-law of Joseph Dort is secretary to Sykora. Mrs. Kulicek's testimony is corroborated by her daughter Olga and her son Vladimir. Her son Hugo, who conducted negotiations with Sykora, did not testify. Mrs. Kulicek's husband Joseph is dead.

Mrs. Kulicek's testimony is that on September 14, 1931, Sykora (as on two prior occasions) borrowed the Kral mortgage to use as security, promising to return it and giving the joint note of himself and his wife of that date for $5000, due July 28, 1934, with collateral security to assure its return. She is corroborated by her daughter Olga, who says she heard Sykora promise he would see everything was returned; by her son Vladimir, who says Sykora told him that the writing on the back of the note was his own and that he wrote it for the protection of the Kulicek so no one could buy the note; by Mrs. Kral, who says that upon its maturity in July, 1934, when she spoke to Sykora about an extension of the mortgage he said he would talk to Mrs. Kulicek about it; by Charles Musgrove, vice-president of the Continental National Bank, who says that Sykora when questioned by him later about the transaction told him that he "borrowed" the mortgage.

On the contrary Sykora testifies that September 14, 1931, (as in each prior transaction where he received the Kral mortgage) he purchased it. He says the bank in which his money was deposited had shortly before closed; that he told the parents of his wife he needed money and that Mrs. Kulicek proposed that they help out by

selling the Kral mortgage to him, he giving them his note in payment for it. This conversation, he says, was on September 13, 1931, and on the 14th he returned bringing the collateral note of himself and his wife for $5000 with a master's deed, a first mortgage and a second mortgage as collateral security; that he told the Kuliceks he would have to sell the Kral mortgage and for their protection he at that time wrote after the endorsement of each of them made on the back of the principal note the words "without recourse," explaining that if the mortgage should ever be foreclosed they could not be held liable for the deficiency. He says the Kuliceks then gave the Kral principal note, coupons and trust deed to him; that he took these to his safety deposit box where they remained until October 8, 1931, when he sold the mortgage to Joseph Dort. Sykora says that after the transaction in which he received it from the Kuliceks he advertised this mortgage for sale in the Bohemian paper, Denni Hlasatel, which was usually read by the Kuliceks, as he had before told them he would do; that several times thereafter Mrs. Kulicek questioned him about the advertisement and on the day after the mortgage was sold told him in the presence of his wife that she was glad to hear it. He says that the interest on the Kral note from July 28, 1931, to September 14, was computed and found to be $39.17; that on September 14th he gave his check to the Kuliceks for this amount. The check is in evidence and bears their endorsement. The principal note of Mrs. Kral is also in evidence; on the back of it, under date of August 26, 1924, and August 24, 1929, are writings showing extensions of the time of payment. Under the last date the writing states that the rate of interest shall be 6%. In the right hand corner of the back of the note at the top and enclosed on 3 sides by lines drawn in ink, appears the endorsement "pay to the order of Antonie Kulicek and Joseph Kulicek." Their names are written on printed lines underneath, evidently a form

put there to be so filled when desired. In front of each name is a cross. To the left of these in the left hand corner are written the names of Antonie Kulicek and Joseph Kulicek, each in black ink with a heavy line also in black ink underneath the name, and underneath each heavy line also in black ink appear the words, "without recourse." Sykora says he wrote these words "without recourse" on the 14th of September, explaining to the Kulicek when he did so that as the mortgage must be sold the purpose was to prevent the possibility of the endorsers being held liable for a deficiency if the Kral mortgage should at any time thereafter be foreclosed. At the same time the unpaid coupons were likewise endorsed, "without recourse." The previous coupons which had been paid were not thus endorsed. Sykora says he sold the Kral mortgage to Joseph Dort, Sr. on October 8, 1931, at his office; that Dort had looked at the property; said he would be willing to buy the mortgage but he had a first mortgage known as the Mankowski mortgage maturing November 1, 1931, and that he would like to deliver that mortgage as part payment on the Kral mortgage and pay the difference in cash. His proposition was accepted. The interest on the Kral mortgage from July 28, 1931, to October 8th was computed and amounted to $58.33. The Mankowski mortgage with accrued interest amounted to $4120, which left a balance due to Sykora in the transaction of $938.33. Dort then gave Sykora the check of his son Joseph, Jr., for $1000, and Sykora gave him a check for the difference, amounting to $61.67. The documents disclosing this transaction at this time are in evidence and corroborate the testimony of Sykora and the Dorts.

Some time in 1932, Sykora says at the request of Mrs. Kulicek he met her son Hugo at the office of Mr. Musgrove at the Continental bank. Musgrove asked an explanation of the transaction

of September 14, 1931, in which Sykora had given the collateral note of himself and his wife and the mortgage securities. Sykora says he explained the transaction and told him he had purchased the Kral mortgage; that Mr. Musgrove said he understood it and bade him good-bye. In the spring of 1932 Musgrove told Hugo Kulicek that he should get a new note with a judgment clause in it from Sykora. About this time Joseph and Hugo Kulicek consulted Mr. Replogle, attorney for the bank of which Musgrove was an officer. Replogle drew up a new note containing a power to confess judgment and other provisions with reference to the sale of collateral, etc. Sykora and his wife were asked to execute this note and substitute it for their collateral note given on September 14, 1931. The new note was for the same amount ($5000), was dated back to July 28, 1931, and by its terms would become due at the same time as the former note, namely, July 28, 1934. March 29, 1932, Sykora and his wife in fact executed this new note and their former note was canceled and delivered to them. On the new note appears an endorsement in the handwriting of Hugo Kulicek acknowledging the payment of interest from July 28, 1931, to September 14, 1931. The notes are in evidence. Sykora says that not until July, 1934, did Mrs. Kulicek raise any question about this second collateral note. At that time she told him that Mrs. Kral had been asking her about the extension of the mortgage about to become due, and that she had told Mrs. Krall she would have to see Sykora. At the same time Mrs. Kulicek told Sykora he must not forget that his own $5000 note would be due July 28th and that she would need the money. He told her he would see if he could raise it. He has never paid the note, still owes it to her, but he paid interest on it and checks showing such payments by him (the last on ~~December 21, 1936~~ April 12, 1934) are in evidence.

Joseph Dort also testified in detail as to his purchase of the mortgage on October 8, 1931; stated that he did not know

the Kuliceks had any interest in it, and corroborates in detail the testimony of Sykora, whose testimony is also corroborated by the notes, checks and, in general, all the writings in evidence. Joseph Dort, Jr., whose check for $1000 was used in the transaction, also testified identifying his check which is in evidence. The evidence of the Dorts and Sykora is corroborated by the writings and supports the findings of the Master that Sykora did not borrow but purchased the Kral mortgage September 14, 1931, and sold it to Joseph Dort October 8th thereafter, and that Dort took for value without notice of any equities of the Kuliceks. If, as a matter of fact, Sykora purchased the mortgage, it is immaterial whether Dort is a holder for value in due course. On the issue of fact the Master expressly found that Sykora purchased the Krall mortgage September 14, 1931.

There has been some doubt in this State as to the weight which should be given to the findings of a master, but the authorities agree that in cases involving transactions of this kind, where a master has seen and heard the witnesses, his findings, when approved by the chancellor, are entitled to much weight in a court of review. Keuper v. Mette, 239 Ill. 586. In the quite recent case of Pasedach v. Auw, 364 Ill. 491, the Supreme court has gone so far as to say that under such circumstances, "we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence, North Side Sash and Door Co., v. Hecht, 295 Ill. 515; Klekamp v. Klekamp, 275 id. 98." That rule is applicable and determinative here, and the decree is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

39773

JAMES C. KELSEY,
Appellee,

vs.

FLORRAINE W. KELSEY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

294 I.A. 603

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On December 1, 1936, plaintiff filed his bill for divorce against Florraine Kelsey, his wife. The bill alleged the marriage of the parties at Kansas City, Missouri, on July 16, 1931; the birth of one child, Rosanna, then 14 months old; charged that defendant was guilty of extreme and repeated cruelty, in that on several occasions named she struck him, etc. The bill also specifically averred that on November 30, 1936, in Chicago, defendant had committed adultery with one John Doe. Plaintiff prayed for custody of the child and for divorce. Defendant appeared and demanded trial by jury. On February 2, 1937, she filed a counter claim averring that although she had at all times been a faithful wife plaintiff was guilty of extreme and repeated cruelty, naming specific dates on which, while drunk, he had struck, kicked and bit her, and knocked her down, using vile and obscene language toward her; that he was guilty of habitual drunkenness. She prayed for divorce and custody of the child and maintenance for herself and the child. She also answered the bill, denying its allegations and in particular the charge of adultery. Plaintiff answered the counterclaim, denying the charges made against him in it.

The cause was put at issue and came on for hearing on March 4, 1937. Both parties were represented by attorneys who were present. The attorney for plaintiff stated the parties had adjusted their differences and "arrived at a settlement for the wife and an order for the support of the child." Plaintiff, he

STATE OF DELAWARE,
Appellee,
vs.
HOWARD W. EMERY,
Appellant.

294 I.A. 603

IN JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT:

On December 1, 1930, plaintiff filed his writ of divorce against Florence Emery, his wife. Two days thereafter the marriage of the parties at Kansas City, Missouri, on July 16, 1921; the birth of one child, Rosanne, then 14 months old; charged that defendant was guilty of extreme and repeated cruelty, in that on several occasions around the first of May, etc. The writ also specifically averred that on November 30, 1930, in Wilcomb, defendant had committed adultery with one Jack Doe. Plaintiff prayed for custody of the child and for alimony. Defendant appeared and demurred; that demurrer was overruled by July. On February 3, 1931, she filed a general denial and a cross-bill. In the latter she charged plaintiff with cruelty and adultery with one Mary Roe, naming time and place, and specified Mary Roe, using wife and numerous familiars toward her; that he was guilty of habitual drunkenness. She prayed for divorce and custody of the child and maintenance for herself and the child. She also answered the bill, denying its allegations and in particular the charge of adultery. Plaintiff answered the cross-bill, denying the allegations of cruelty, averring condonation, denying that he had ever committed adultery with Mary Roe, and specifically Mary Roe on Wilcomb, with other women, times and places specified. Defendant filed a reply to plaintiff's answer to her cross-bill, denying generally, pleading specifically facts on which, with other women, times and places specified, she relied to show that plaintiff was guilty of extreme and repeated cruelty, pleading that plaintiff had committed adultery with Mary Roe, and alleging that although plaintiff had made claim several times that although she had a liability of $1,000 on a note, which she had paid, plaintiff had refused to pay it. On February 3, 1931, she filed a general denial and a cross-bill. In the latter she charged plaintiff with cruelty and adultery with one Mary Roe. Plaintiff prayed for custody of the child and for alimony. Defendant appeared and demurred; that demurrer was overruled by July

said, had been in receipt of an average income of $8000 for 6 years then past, and in 1936 his income was about $12,000. Plaintiff was called as a witness, gave evidence briefly as to jurisdictional facts, stated that the parties had separated about November 20, 1936. He said he understood that if the court granted a decree to Mrs. Kelsey, because of the age of the child she was to have her until a further order of the court, subject to his right to see her at reasonable times and have the custody of her reasonably and for two months in the summer. He then testified that on October 27, 1936, defendant struck him about the face and bruised him, and that again about November 18th she struck him about the face when he was having a readjustment of his spine due to a short limb. He said that at that time she bruised him very seriously and caused him a great deal of pain. An attorney representing Mrs. Kelsey then asked the plaintiff if he realized that during the time he was to have the child in summer she also was permitted to see it, and he replied that he understood that. Attorney for plaintiff then said: "Another proposition. There is an arrangement here my client pay Mrs. Kelsey the sum of $420 at the rate of $70 a month in full of all claims of every kind. He is to pay $50 a month for the support and maintenance of the child. We have an arrangement relative to certain furnishings and Mrs. Kelsey is in the room. I want to ask her if she understands this settlement." The court then inquired if the $420 represented a lump sum settlement and was for all claims of alimony exclusive of attorneys' fees, and received an affirmative reply. Anna E. Kelsey, mother of plaintiff, was then called as a witness. She said the parties had lived with her since May; that plaintiff treated his wife well, but she was very cruel; "they fussed a great deal"; that on October 27, 1936, the wife struck him in the face and bruised him, and again on November 18th she struck him in the face and tore off his clothes without any

reason that she saw. Attorney for defendant announced there would be no cross examination, and defendant was then sworn and examined by attorney for plaintiff. She was asked if the settlement had been discussed with her by her attorneys and if she was satisfied. She replied, "Yes." The court then inquired, "Do you understand you are to receive the sum of $420 in full settlement?" She replied, "Yes". The court further inquired, "For all claims of alimony?" She replied, "Yes." The court said, "You can't come back later and claim you are dissatisfied with the agreement at some later date. You know that?" She answered, "That's right." The court said, "This is final and definite. Further you are to receive the sum of $50 a month for the support of the child temporarily. That is until the further order of the court. That's correct." She answered, "That's right." One of her attorneys then stated they had made a written agreement for the division of the furniture. His attorney then questioned, "You appreciate the fact this order for the child can be changed at any time at all if the child does not get the proper care," and the court added, "I would like to advise you further that the question of the custody of the child is always subject to change by the Court at some future time, in the event the circumstances warrant it, so while you conduct yourself as a good mother, take proper care of your child, you may have the child, but in the event evidence is presented in the future to show the mother has not taken proper care of the child and has not conducted herself in a manner well becoming a good mother the child may be taken from you and placed in an institution or turned over to your husband or some other person. So the Court hopes you won't be back before this Court in the future on any petition to change the custody of the child on account of your conduct. That is about all I can say." The witness was excused, and there

followed a discussion of attorneys' fees for defendant's counsel. The court stated he thought a fair and reasonable allowance would be $300, and the attorneys for the parties acquiesced in that statement.

On March 8, 1937, a decree of divorce was entered finding defendant guilty of cruelty without cause or provocation, dissolving the marriage, providing for payment to defendant of $420 at the rate of $70 a month; that $300 be paid for attorneys' fees and making some further provision as to division of various articles of furniture between them; giving the custody of the minor child to the mother subject to plaintiff's right to visit the child, and providing that plaintiff pay to defendant $50 a month for the support of the child during the time it was in her custody. The original decree bears the O. K. of solicitors for plaintiff and defendant.

April 1 the present counsel for defendant was substituted of record. April 5 the solicitor for defendant presented a petition to Judge Finnegan, who entered an order assigning the motion for leave to file it to Judge LaBuy, by whom the cause was originally heard. The petition was by defendant, praying that the decree theretofore entered might be set aside. Judge LaBuy, after hearing evidence in open court, gave leave to file the petition, ruled the plaintiff to answer it in 10 days, and transferred the cause to Judge Finnegan. The petition was verified and contains 9 paragraphs. In substance it asks that the divorce decree may be set aside because there was collusion between the parties, because defendant was intimidated in a way which prevented her from presenting her cause, and because plaintiff husband entered into a conspiracy with the man found with her in the hotel to entrap and disgrace her. The Chancellor who heard the evidence found against the petitioner on the

Chancellor and there was evidence tending against the petitioner on the
the time young wife was in the hotel to return and live with her. The
cause, and because plaintiff imposed undue time a conviction with
was initiated in a way which prevented her from presenting her
cause there was collusion between the parties, because petitioner
In addition it asks that the divorce decree may be set aside be-
plaintiff to answer it in 10 days, and transferred for cause to
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toture entered might be set aside. Under Indiana, after hearing evi-
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defendant.

subpoena of the court during the time it was in her custody. The
providing that plaintiff pay to defendant $50 a month for the
the mother subject to plaintiff's right to visit the child, and
furniture between them; giving the custody of two minor girls to
nothing even further provision as to division of various articles of
the rate of $70 a month; that $600 be paid for attorneys' fees and
ing the marriage, providing for payment to defendant of $450 at
defendant guilty of cruelty without cause or provocation, dissolv-

On March 9, 1937, a decree of divorce was entered finding

attorneys.

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attorneys.

facts and dismissed her petition. His findings are entitled in this court to the same weight as a verdict of a jury.

There is practically no evidence tending to show collusion between the parties. On the contrary all the evidence indicates a bitter controversy between them which finally reached the stage where the plan was adopted of making an agreement concerning alimony and property rights, leaving the issues as to the merits of the cause to be determined by the evidence. Decrees entered under similar circumstances have been upheld by the reviewing courts in many cases, of which it will be sufficient to cite Shankland v. Shankland, 301 Ill. 624, and Smith v. Smith, 334 Ill. 370. The occurrences upon the trial of the bill for divorce have been already described. It is manifest the trial Judge was informed of the situation and was careful and conscientious in the performance of his duties. He informed Mrs. Kelsey of her rights, her obligations and the effect of the decree. The situation was not one in which she was suddenly compelled to decide what course she would pursue. The occurrence at the hotel took place November 30, 1936. Plaintiff's bill for divorce was filed the following day, December 1. The cause was not heard until March 4, 1937. In the intervening time legal counsel was available to Mrs. Kelsey; three lawyers representing her were present in the courtroom at the time of the hearing. Her attorneys of record at that time (quite consistently) have withdrawn their appearance. She makes no charge of disloyalty against them nor were any facts disclosed which would indicate that they were not devoted to her interests. Indeed, the solicitor who now represents her was in fact present at the hearing and examined the divorce decree before it was entered. She says she did not tell Judge LaBuy of the situation confronting her because she was advised by her attorneys that if she did plaintiff would go through with the adultery charge against her. She made no disclosure, although she

must have known that she would have received the protection of the court. The only explanation of her attitude and conduct upon the divorce trial is that under advice of three lawyers (who she says told her that otherwise they would withdraw from the case) she concluded that the occurrence at the hotel could not be explained on the theory of her innocence. Her determination not to contest seems to have been in the exercise of discretion on her part under the advice of her solicitors. This is not sufficient to show either collusion or intimidation.

It was at first agreed at the hearing that the evidence should be confined to the allegations of collusion, etc., as set up in the 3rd paragraph of the petition. Afterward her attorney requested the privilege of offering evidence as to the other charges of conspiracy and entrapment, and she was permitted to give such evidence.

It was disclosed that the man found at the hotel with petitioner was Charles English. Petitioner testifies that a few days after the divorce decree plaintiff admitted to her that English had been hired by him to procure evidence indicating that she was guilty of wrongdoing. She testifies her attorney secured an affidavit from English disclosing the facts of the conspiracy, but her solicitor on the hearing declined to produce the affidavit and English was not produced as a witness. She says that English, in the office of her solicitor, admitted the conspiracy with her husband against her and expressed regret for his conduct. His penitence, however, did not go to the extent of bringing him into court as a witness. The plaintiff, under oath, denies these charges of connivance and conspiracy.

The petitioner's narration of her relationship to English is improbable to a high degree. She says English called her on the telephone; that she met him and asked him to get her police dog

which her husband had taken away, and that while on the way he "dragged" her into a Chinese restaurant and offered her a drink, which she took, and that she was found in the hotel afterward. She also says that on the following morning English called her on the telephone and threatened her if she did not keep his name out of the situation, said he would blow her brains out. She went to her then attorney, Mr. Davis, and told him a story to the effect that a man she did not know, instigated by her husband had kidnapped her. She says English told her to tell this story to Mr. Davis, which she did, and that an assistant from his office went with her to the State's Attorney's office, where she repeated the same story, as she says, because she was not free to tell the truth. Contrary to other statements, she now says she met English first on November 19, 1936. She says she was introduced to him by Dr. Charles Crawford whom she first met at her home in the early summer, when he came there with a girl friend; she asked Dr. Crawford if he would recommend somebody that she could get to do some trailing for her; that she did not have very much money, and Dr. Crawford recommended English and introduced him to her; after she first met him she went out with him twice on trips following Mr. Kelsey before the night she was found in the hotel; she had seen him several other times and talked with him over the telephone; she could not remember the last time she had seen him prior to the occurrence at the hotel, but she thought she saw him the day before; she says English told her that Kelsey gave him $1500; she testifies in detail as to what English told her, which was, of course, mere hearsay. As far as the charge of entrapment and conspiracy between English and her husband is concerned, her case rests entirely upon her unsupported testimony to the effect that plaintiff admitted to her that he had hired English to frame up a case against her. The answer of the plaintiff to the petition denies all these charges

under oath. In view of the fact that petitioner admits that after the hotel occurrence she, at the request of English, made false statements to the State's Attorney and to her own solicitor with reference to her relationship with English; in view of the fact that English was not called as a witness notwithstanding his reputed penitence; in view of her entire conduct after the occurrence at the hotel indicating she was not resentful toward English but, on the contrary, acted upon his advice, we hold the Chancellor was justified in declining to set aside the decree. The controlling question on this record is whether the Chancellor abused his discretion. We hold he did not. There is, of course, a possibility that English, who was employed by the petitioner, may have betrayed her to her husband for a consideration, but the evidence would not justify a finding to that effect. In all the hearings petitioner received every consideration from the Judges who heard these matters.

The original decree and the order denying the prayer that the decree be set aside are affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

under oath. In view of the fact that petitioner admits that after the hotel occurrence she, at the request of English, made false statements to the Grace's attorney and to her own solicitor with reference to her relationship with English; in view of the fact that English was not called as a witness notwithstanding the requested permission; in view of her entire conduct after the occurrence at the hotel indicating she was not concerned toward English but, on the contrary, acted upon its advice, we hold the Commissioner was justified in declining to set aside the decree. The contrary inference on this record is the Commissioner passed his discretion. We hold he did not. There is, of course, a possibility that English, who was employed by the petitioner, may have required her to her husband for a consideration, but the evidence would not justify a finding to that effect. In all the briefs petitioner received every consideration from the Judges who heard these matters.

The original decree and the order denying the motion that the decree be set aside are affirmed.

Affirmed.

O'Connor, P. J., and Sturgis, J., concur.

39827

I. SIDNEY NEIMAN,
Appellee,

vs.

TEMPLETON, KENLY & COMPANY, Limited, a Corporation, WALTER B. TEMPLETON, Individually and as President of said Corporation, and F. W. KRICKHAN, Individually and as Secretary of said Corporation,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 603

PER CURIAM.

When the Circuit court ordered the writ of mandamus to issue in the above entitled cause, defendants filed a notice of appeal and the court fixed the amount of the appeal bond at $10,000; defendants filed the bond but appeal to this court, challenging the validity of the order for alleged irregularities in the entry of the order and also asserting that it is excessive. The appeal has been docketed in this court as a separate appeal.

We do not deem it necessary to pass upon these points. In this same case, No. 39826, opinion filed this day, we held that it was error to issue the writ and remanded the cause with directions to dismiss the petition. It follows, therefore, that the instant order, which is based upon the validity of the order that the writ issue, must follow the fate of the order entered in the principal case and must also be reversed.

REVERSED.

O'Connor, P. J., and Matchett, J., concur.

29 I.A. 603

I. GIBNEY HOLMES,
Appellee,

vs.

THOMPSON, KENLY & GEORGE,
Limited, a Corporation, and
THOMPSON, Individually and as
President of said Corporation,
and J. T. KINCHEN, Individually
and as Secretary of said Corporation,
Appellants.

PER CURIAM.

Upon the circuit court ordered the writ of mandamus to issue in the above entitled cause, defendants filed a notice of appeal and the court fixed the amount of the appeal bond at $10,000; defendants filed the bond but appeal to this court, questioning the validity of the order allowing intervention in the entry of the order and also asserting that it is excessive. The appeal has been docketed in this court as a separate appeal.

We do not deem it necessary to pass upon these points.

In this case, No. 3683, opinion filed this day, we hold that it was error to issue the writ and remanded the cause with directions to dismiss the petition. It follows, therefore, that the instant order, which is based upon the validity of the order that the writ issue, must follow the fate of the other entered in the principal case and must also be reversed.

Reversed.

O'Connor, P. J., and Ketcham, J., concur.

39565

JULIUS A. BISNO,
Appellant,

v.

BENJAMIN J. BROXTON,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

294 I.A. 603

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment by confession on a promissory note for $2,500, together with interest and attorney's fees. Thereafter defendant's petition to vacate the judgment was permitted to stand as an affidavit of merits to plaintiff's claim, and trial was had by the court without a jury resulting in a finding and judgment for defendant, from which plaintiff appeals.

The facts disclose that April 8, 1932, defendant executed and delivered to plaintiff the promissory note in question, in the sum of $2,500, payable to plaintiff's order six months after date, with interest. Contemporaneously with the making of the note the parties executed a real estate contract for the purchase and sale of premises known as 5161-63 South Michigan avenue, in Chicago, in which plaintiff was vendor and defendant vendee. When the parties entered into this agreement the property was heavily incumbered, and it was contemplated that plaintiff should make good title, as disclosed by the following rider attached to the agreement:

"It is understood and agreed by and between the parties hereto that the said party of the second part [vendor] has not at this time good and sufficient title to convey said property to the said party of the first part, [vendee], but agrees to work and clean up said title according to the terms and conditions of said contract, and said party of the first part agrees to purchase said property under the following terms and conditions enumerated in said contract.

39691

JULIUS A. MACKO,
Appellant,

v.

BENJAMIN I. SCHULTZ,
Appellee.

COURT OF CHICAGO.

ALFRED J. KUMMINGS,

29411.603

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment by confession on a promissory note for $2,500, together with interest and attorney's fees. Thereafter defendant's petition to vacate the judgment was permitted to stand as an affidavit of merits to plaintiff's claim, and trial was had by the court without a jury resulting in a finding and judgment for defendant, from which plaintiff appeals.

The facts disclose that April 8, 1932, defendant executed and delivered to plaintiff the promissory note in question, in the sum of $2,500, payable to plaintiff's order six months after date, with interest. Contemporaneously with the making of the note the parties executed a real estate contract for the purchase and sale of premises known as 3161-63 South Michigan avenue, in Chicago, in which plaintiff was vendor and defendant vendee. When the parties entered into this agreement the property was mortgaged, and it was contemplated that plaintiff should make good title, as disclosed by the following rider attached to the agreement:

"It is understood and agreed by and between the parties hereto that the said party of the second part [vendee] has not at this time good and sufficient title to convey said property to the said party of the first part, [vendee], but agrees to cure and clean up said title according to the terms and conditions of said contract, and said party of the first part agrees to purchase said property under the following terms and conditions enumerated in said contract.

"It is further understood and agreed by and between the parties hereto that should it be impossible for the party of the second part to obtain good title, then this contract is null and void, and any deposit received by the party of the second part should be returned to the party of the first part, and the party of the second part shall not be held liable for any damages."

The next paragraph of the rider relates to the manner in which the stipulated purchase price of $25,000 was to be paid by defendant, and refers to the note in question, which under the provisions of the agreement was deposited to secure the faithful performance of the contract. The agreement then provides that defendant is to deposit the note, payable six months after date of the contract, with the understanding that should plaintiff be in a position to deliver title defendant then agrees to pay the $2,500 in cash, assume the title and purchase the property according to the terms of the contract, and at the same time defendant was to receive his note back from plaintiff. The provision of the contract covering this portion of the transaction is as follows:

"It is not necessary for the party of the second part to show a clear title in order to require the party of the first part to put up the twenty-five hundred ($2,500) dollars, but it is sufficient when the party of the second part writes a registered letter to the party of the first part stating that he is in a position to deliver said title and is prepared to make an escrow under said terms. Upon the payment of the $2,500 the party of the first part shall receive back his deposit note for twenty-five hundred ($2,500) dollars."

The note and agreement were executed April 8, 1932. Thereafter, December 3, 1932, plaintiff sent to defendant a registered letter reading in part as follows:

"I, herewith, advise you that I have made the necessary arrangements to close up this deal in accordance with the terms of said contract.

"I here and now call upon you, in accordance with terms of said contract, to put up in cash the sum of $2,500 in escrow in the Chicago Title & Trust Company - the $2,500 not to be used by the Chicago Title & Trust Company except if, when, and as I am able to deliver the property to you in accordance with the terms of your signed agreement.

"I respectfully call your attention to the fact that if within twenty days of the date of receipt of this letter by you

"It is further understood and agreed by and between the parties hereto that should it be impossible for the party of the second part to obtain good title, then this agreement is null and void, and any deposit received by the party of the second part should be returned to the party of the first part, and the party of the second part shall not be held liable for any damages."

The next paragraph of the rider related to the manner in which the stipulated purchase price of $[illegible] was to be paid by defendant, and refers to the note in question, which under the provisions of the agreement was deposited to secure the faithful performance of the contract. The agreement then provides that defendant is to deposit the note, payable six months after date of the contract, with the understanding that plaintiff be in a position to deliver title. Defendant then agrees to pay the $2,500 in cash, assume the title and purchase the property according to the terms of the contract, and at the same time defendant was to receive his note back from plaintiff. The provision of the contract covering this portion of the transaction is as follows:

"It is not necessary for the party of the second part to show a clear title in order to require the party of the first part to put up the twenty-five hundred ($2,500) dollars, but it is sufficient when the party of the second part writes a registered letter to the party of the first part stating that he is in a position to deliver said title and is prepared to make in escrow under said terms. Upon the payment of the $2,500 the party of the first part shall receive back the said note for twenty-five hundred ($2,500) dollars."

The note and agreement were executed April 3, 1922. Thereafter, December 3, 1923, plaintiff sent to defendant a registered letter reading in part as follows:

"I, herewith, advise you that I have made the necessary arrangements to close my title deal in accordance with the terms of said contract.

"I here and now call upon you, in accordance with terms of said contract, to put up in cash the sum of $2,500 in escrow in the Chicago Title & Trust Company - the $[illegible],000 not to be paid by the Chicago Title & Trust Company except it, when, and as I am able to deliver the property to you in accordance with the terms of your signed agreement.

"I respectfully call your attention to the fact that if within twenty days of the date of receipt of this letter by you

you fail to put up the $2,500 in accordance with the terms of your contract, then and in that event, the $2,500 note which I hold will be forfeited by you as liquidated damages in accordance with the terms and provisions of said contract."

It is conceded that notwithstanding the receipt of this letter the money was never deposited with the Chicago Title & Trust Company, nor was the note ever paid.

The first question presented for determination is whether there was any consideration for the note. It is urged by plaintiff that the burden of proving want or failure of consideration rested upon defendant, who asserts this defense. While that appears to be the general rule, the question of the burden of proof is not in issue because the facts relating to the giving of the note, and the consideration or lack thereof, must be ascertained from the note and the contract itself, which were signed contemporaneously, no other evidence having been presented upon this question. When properly analyzed it appears to us that the contract and rider consists of two parts: first, an option by plaintiff to sell the real estate in question to defendant; secondly, upon the exercise of this option, a contract for the sale of the real estate. Under the settled law of contracts, in order that promises may constitute a consideration for the giving of a promissory note there must be valid promises, binding on both parties (6 Ruling Case Law, sec. 84, p. 677; Armstrong Paint Works v. Continental Can Co.,301 Ill. 102, 108.) The second paragraph of the rider, which provides "that should it be impossible for the party of the second part to obtain good title, then this contract is null and void, and any deposit received by the party of the second part shall be returned to the party of the first part," would seem to destroy any possibility of a binding promise on defendant's part. There is no binding obligation on the part of plaintiff to do anything; nevertheless, it is argued that plaintiff could, at any undetermined time, compel performance on the part of defendant without obligating him-

compel performance on the part of defendant without mitigating circumstances, it is argued that plaintiff could, at any unreasonable time, no binding obligation on the part of plaintiff to so continue never- any possibility of a binding promise on defendant's part. There is be returned to the party of the first part," would seem to destroy void, and any deposit received by the party of the second part would of the second part to obtain good title, then this contract is null and the rider, which provides "that should it be impossible for the party v. Continental Can Co., 301 Ill. 103, 103.) The second paragraph of giving of a promissory note there must be valid promises, binding on both parties (6 Ruling Case Law, sec. 84, p. 677; Armstrong Paint &

You fail to put up the $2,500 in accordance with the terms of your contract, then and in that event, the $1,500 note which I hold will be forfeited by you as liquidated damages in accordance with the terms and provisions of said contract."

It is conceded that notwithstanding the receipt of this letter the money was never deposited with the Tribune Trust Company, nor was the note ever paid.

The first question presented for determination is whether there was any consideration for the note. It is urged by plaintiff that the burden of proving want or failure of consideration rested upon defendant, who asserts this defense. While that appears to be the general rule, the question of the burden of proof is not in issue because the facts relating to the giving of the note, and the execution or lack thereof, must be ascertained from the note and the contract itself, which were signed contemporaneously, no other evidence having been presented upon this question. When properly analyzed it appears to us that the contract and rider consists of two parts: First, an option by plaintiff to sell the real estate in question to defendant; secondly, upon the exercise of this option, a contract for the sale of the real estate. Under the settled law of contracts, in order that promises may constitute a consideration for the

self in any manner whatsoever. Agreements so drawn violate the fundamental principles of contract holding that an agreement must be binding upon both parties where the performance of mutual acts or the giving of mutual promises furnishes the consideration for the agreement.

The only other theory upon which plaintiff could expect to recover is that he had an option to compel performance by defendant through means of the registered letter specified in the contract, and this is apparently the theory upon which plaintiff acted when the letter was sent to defendant. On that theory, however, it would have been necessary for plaintiff to make his letter comply with the terms of the agreement, which provides that "should vendor [plaintiff] be in a position to deliver title, that vendee [defendant] then agrees to pay the $2,500." Plaintiff sought to show a compliance with this provision of the contract by offering in evidence the registered letter, the material portions of which are hereinbefore set forth. A careful perusal of this letter, however, does not disclose that plaintiff was in a position to deliver title nor that he was prepared to make an escrow under the terms of the letter. He merely said that he had "made the necessary arrangements to close up this deal in accordance with the terms of the contract," and calls upon defendant to put up $2,500 in escrow with the Chicago Title & Trust Company. The contract and rider evidently contemplated that plaintiff was to notify defendant that he was prepared to make an escrow, and that could only mean that he was ready to deposit the necessary documents which would enable him to comply with the terms of the agreement. Obviously, the Chicago Title & Trust Company would not have required defendant to deposit the $2,500 in cash until a satisfactory showing had been made by plaintiff to cure an admittedly defective title by the production of satisfactory documents, and the letter offers no assurance whatever

of satisfactory documents, and the letter offers no assurance whatever by plaintiff to cure an admittedly defective title by the production of a clear title insurance company would have required defendant to deposit the $2,500 in escrow until a satisfactory showing had been made by plaintiff to comply with the terms of the agreement. Obviously, the Chicago title & Trust Company would not have required defendant to deposit the $2,500 in escrow, and that could only mean that he was ready to deposit the necessary documents which would enable him to comply with the terms of the agreement, and that could only mean that he was prepared to make an escrow, and that could only direct and under existing circumstances that plaintiff was to notify defendant that he was prepared to make an escrow, and that could only be done by the deposit of the documents which would enable him to comply with the terms of the agreement.

The only other theory upon which plaintiff could argue in recover is that he had an option to compel performance by defendant through means of the registered letter specified in the contract, and this is apparently the theory upon which plaintiff acted when the letter was sent to defendant. On that theory, however, it would have been necessary for plaintiff to make his letter comply with the terms of the agreement, which provides that "should vendee [plaintiff] be in a position to deliver title, that vendee [defendant] then agrees to pay the $2,500." Plaintiff sought to show a compliance with this provision of the contract by offering in evidence the registered letter, the material portions of which are hereinbefore set forth. A careful perusal of this letter, however, does not disclose that plaintiff was in a position to deliver title nor that he was prepared to make an escrow under the terms of the letter. He merely said that he had made the necessary arrangements to close up this deal in escrow with the terms of the contract," and calls upon defendant to put up $2,500 in escrow with the Chicago Title & Trust Company. The con-

to defendant that plaintiff contemplated curing the title by the production of such documents or that he was prepared to do so. Under the circumstances, there was no acceptance of plaintiff's option to enter into the agreement for the sale and purchase of the premises, and no recovery could be had upon the option theory. The law is well settled that an option, so long as it remains unexpired, is a unilateral writing which lacks the mutual elements of a contract, and must be accepted or election made to proceed under its terms in an unqualified manner, which election must be communicated to the party giving the option. (Northern Illinois Coal Corp. v. Cryder, 361 Ill. 274.) It does not appear from the record that plaintiff was ever in a position to deliver a good title to defendant under the agreement. Both parties knew that the title was defective when the contract was signed, and the rider clearly indicates that the consummation of the agreement was dependent upon plaintiff's ability to cure the defects. The contract provided in plain terms that if it was impossible for plaintiff to deliver title the contract should be null and void. The promise of defendant to pay for the title was not supported by an equally binding promise on the part of plaintiff to deliver the title.

Furthermore, it is evident from the admitted circumstances of the case that there was no unconditional delivery of the promissory note by defendant to plaintiff; in fact, the giving of the note was so proscribed by various provisions of the agreement that payment thereof could not be enforced unless these various conditions were fulfilled on the part of plaintiff. In both Ehlert v. Cleminson, 253 Ill. App. 346, and Bell v. McDonald, 308 Ill. 329, it was held that a note delivered on condition is inoperative until the condition has been complied with.

The contract describes the instrument sued on as a "deposit

note", and provides that it should not become effective until plaintiff mailed a registered letter to defendant stating that he is in a position to deliver title and prepared to make an escrow under the terms of the agreement. Plaintiff's counsel relies principally upon the registered letter as a foundation for his right to recover. It is conceded that nothing was done by plaintiff during the interim between the execution of the note and contract and December 3rd, 1932, when the letter was written. There is no evidence tending to show that plaintiff made any attempt to cure the defective title, and in the absence of any such evidence or of any satisfactory assurance in the letter that he was prepared to deliver title, and to make the escrow, the condition upon which the note should become effective was never complied with.

Several other points are raised in the briefs of the respective counsel, but in view of the conclusion reached it would serve no useful purpose in discussing them. We are of the opinion that the court properly rendered judgment against plaintiff. The judgment is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

39574

W. J. PINE,
Appellee,

v.

JOSEPH WEIDENHOFF, Inc.,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

294 I.A. 603

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Joseph Weidenhoff, Inc., defendant, appeals from a judgment of $2,500, together with interest, rendered against it in favor of plaintiff pursuant to a hearing by the court without a jury.

June 8, 1932, plaintiff filed his suit consisting of the common counts and an additional count, alleging damages. Appended thereto was a contract between plaintiff and defendant, licensing the latter to manufacture a certain brake testing device under a pending application for patent, which constitutes the basis of this proceeding. Defendant filed its answer in due course and also a plea of the general issue, with an affiavit of defense denying any indebtedness and setting forth the following special defenses: (1) that the plaintiff failed to pursue to final issue the claims in his patent application; (2) that his claims conflicted with those of another patentee and therefore were infringements; (3) that the plaintiff failed to deliver all of the tools, dies, fixtures, patterns and other devices necessary to manufacture the brake tester which was the subject matter of the contract; (4) that the tools, dies, fixtures, patterns and other devices which were delivered to the defendant were not sufficient to efficiently and economically manu-

294 F.A. 603

MR. JUSTICE HOLMES DELIVERED
THE OPINION OF THE COURT.

Joseph Weidenhoff, Inc., defendant, appeals from a judgment of $3,300, together with interest, rendered against it in favor of plaintiff pursuant to a hearing by the court without a jury.

June 8, 1923, plaintiff filed his suit consisting of the common counts and an additional count, alleging damages. Appended thereto was a contract between plaintiff and defendant, licensing the latter to manufacture a certain patent device under a pending application for patent, which constitutes the basis of the proceeding. Defendant filed its answer in due course and also a plea of the general issue, with an affidavit of defense denying any indebtedness and setting forth the following special defenses: (1) that the plaintiff failed to pursue to final issue the claims in his patent application; (2) that his claims conflicted with those of another patentee and therefore were infringements; (3) that the plaintiff failed to deliver all of the tools, dies, fixtures, patterns and other devices necessary to manufacture the trade device which was the subject matter of the contract; (4) that the tools, fixtures, patterns and other devices which were delivered to the defendant were not sufficient to efficiently and commercially manu-

W. J. KERR,
Appellee,
v.
JOSEPH WEIDENHOFF, Inc.,
a corporation,
Appellant.

294 F.A. 603

MR. JUSTICE HOLMES DELIVERED
THE OPINION OF THE COURT.

Joseph Weidenhoff, Inc., defendant, appeals from a judgment of $3,300, together with interest, rendered against it in favor of plaintiff pursuant to a hearing by the court without a jury.

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facture the brake tester; (5) that the parties mutually agreed to abandon the contract.

The case lay dormant until December, 1935, when pursuant to plaintiff's motion the affidavit of defense was stricken and thereafter a new affidavit was filed, omitting the first and second defenses contained in the original affidavit, and the statute of frauds was pleaded as an additional defense. This second amended affidavit was also stricken, the court being of the opinion that the plea of statute of frauds was not applicable, and a third affidavit was subsequently filed containing only the three following defenses set forth in the original affidavit: (1) that of nondelivery of necessary equipment to enable defendant to manufacture the brake tester; (2) that the material which was delivered was insufficient to properly manufacture the device; and (3) mutual abandonment of the contract.

Upon trial it was urged that plaintiff had failed to properly allege ownership of the patent in controversy and had totally failed to prove same. Defendant's counsel sought to introduce evidence of proceedings in the patent office to establish the invalidity of the patent. The court excluded defendant's evidence, and it is now urged by its counsel that this constituted error. The first question thus presented is whether defendant was limited to the defenses set up in its affidavit of defense, notwithstanding the plea of the general issue. It is argued by defendant that because this proceeding was at issue before the Civil Practice act became effective, defendant should have been permitted to introduce evidence pertaining to the invalidity of the patent under its plea. However, the cases are uniformly to the effect that even prior to the enactment of the civil practice act the defenses are limited to the matters specifically set forth in the affidavit of merits, and that all other defenses are considered waived and unavailable on trial.

to abandon the contract.

The case lay dormant until December, 1898, when pursuant to plaintiff's motion the affidavit of defense was stricken and thereafter a new affidavit was filed, omitting the first and second defenses contained in the original affidavit, and the plea of fraud was pleaded as an additional defense. This second amended affidavit was also stricken, the court being of the opinion that the plea of estoppel of fraud was not applicable, and a third affidavit was subsequently filed containing only the three following defenses set forth in the original affidavit: (1) that of nonnegligency of nonexpert employment to enable defendant to manufacture the brake beater; (2) that the material which was delivered was insufficient to properly manufacture the device; and (3) mutual abandonment of the contract.

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(Kadison v. Fortune Bros. Brewing Co., 163 Ill. App. 276.)

In Reddig v. Looney, 208 Ill. App. 413, where the general issue was pleaded, the court upheld the rule laid down in the Kadison case and held that the defendant would not be permitted to place in evidence any matter of defense not stated in the affidavit. In the recent case of Ballard v. Trainor, 285 Ill. App. 509, where the general issue was also pleaded, this division of the appellate court cited with approval the following, taken from Manufacturers State Bank v. American Surety Co., 230 Ill. App. 474: "Before the amendment [1907] was adopted the gates were wide open to the defendant to offer any proper proof under any plea filed by him, but since the adoption of that amendment the gates are closed against him as to all proofs not tending to support the specific defenses set up in the affidavit of defense." Under these decisions the court properly excluded evidence of the ownership of the license rights, the invalidity of the patent, the defense of unworkability which defendant also sought to interpose upon the hearing, and various other items of evidence which defendant's counsel say were erroneously excluded.

The agreement upon which plaintiff's action is based was executed October 11, 1928. Plaintiff had invented a brake testing device and under the contract he gave defendant the exclusive right to manufacture the brake tester. Defendant on its part agreed to pay plaintiff royalties of $1.50 on each device sold, not less than $500 the first year and $1,000 each year thereafter during the life of the agreement. The contract also provided that all tools, dies, fixtures, patterns and other devices necessary to efficiently and economically manufacture the brake tester, would be delivered to defendant's order. The undisputed evidence discloses that defendant did nothing in pursuance of the contract and in 1932 plaintiff sued to recover the so-

(Kadison v. Fortune Fire, Marine Co., 260 Ill. App. 276.)

In Beadle v. Looney, 208 Ill. App. 418, where the general issue was pleaded, the court upheld the rule laid down in the Kadison case and held that the defendant could not be permitted to place in evidence any matter of defense not stated in the affidavit. In the recent case of Ballard v. Ingham, 308 Ill. App. 208, where the general issue was also pleaded, that division of the appellate court sitting with approval the following, taken from Mendelsonn-Rhode Bank v. American Surety Co., 280 Ill. App. 474: "Before the amendment [1907] was adopted the gates were wide open to the defendant to offer any proper proof under any plea filed by him, but since the adoption of that amendment the gates are closed against him as to all proofs not tending to support the specific defenses set up in the affidavit of defense." Under these decisions the court properly excluded evidence of the ownership of the Illinois rights, the invalidity of the patent, the defense of unworkability which defendant also sought to interpose upon the hearing, and various other items of evidence which defendant's counsel may have originally excluded.

The agreement upon which plaintiff's action is based was executed October 11, 1922. Plaintiff had invented a frame bending machine and under the contract he gave defendant the exclusive right to manufacture the brake tester. Defendant on its part agreed to pay plaintiff royalties of $1.50 on each device sold, not less than $500 the first year and $1,000 each year thereafter during the life of the agreement. The contract also provided that all brake, flexible metal and other devices necessary to efficiently and economically manufacture the brake tester, would be delivered to defendant's order. The undisputed evidence shows that defendant did nothing in pursuance of the contract and in 1923 plaintiff sued to recover the no-

called minimum royalty for the years 1929, 1930 and 1931. These damages aggregated $2,500 for the three years, and the court added interest to the total sum of damages found to be due.

Under the special defenses interposed it is first urged that plaintiff failed to prove that the necessary tools, dies and patterns were delivered to defendant's order as contemplated by the agreement. The record discloses that these various devices and parts were in the possession of the Kenosha Die & Stamping Company, at Kenosha, Wisconsin, and when the agreement was signed October 11, 1928, plaintiff delivered to defendant the following order: "Kenosha Die & Stamping Co. Kenosha, Wis. Gentlemen: Please deliver to the order of Joseph Weidenhoff, Inc., all tools, dies, jigs, fixtures, etc., finished and unfinished devices and parts, which you have in your possession, and which were used in the production of the Master Brake Tester. (Signed) W. J. Pine. Date Oct. 11th, 1928. Witness Esther M. Fainer; witness Leslie Weidenhoff." This order authorized defendant to obtain the tools, dies, jigs and fixtures, and so far as the record discloses, the only reason they were not delivered to defendant immediately after the contract became effective is because it made no effort whatsoever to obtain them, never called for them and never asked the Kenosha Die & Stamping Co. to relinquish them.

The patterns from which castings could be made were in the possession of the Badger Foundry Company, at Racine, Wisconsin, and on the same date that plaintiff gave defendant an order on the Kenosha Die & Stamping Company, he also signed an order addressed to the Badger Foundry Company directing them to deliver to defendant all patterns in its possession which were used in the production of the master brake tester. It is apparent from the evidence that defendant never made any attempt to manufacture any of the devices under its

called minimum royalty for the years 1929, 1930 and 1931. These damages amounted $5,000 for the three years, and the costs added interest to the total sum of damages found to be due.

Under the special defenses interposed it is first urged that plaintiff failed to prove that the necessary tools, dies and patterns were delivered to defendant's order as contemplated by the agreement. The record discloses that these various devices and parts were in the possession of the Lincoln Tie & Stamping Company, at Kenosha, Wisconsin, and when the agreement was signed October 11, 1928, plaintiff delivered to defendant the following order: "Kenosha Tie & Stamping Co. Kenosha, Wis. Gentlemen: Please deliver to the order of Joseph Goldsmith, Inc., all tools, dies, jigs, fixtures, etc., finished and unfinished devices and parts, which you have in your possession, and which were used in the production of the Master Brake Tester. (Signed) H. J. Ihde. Date Oct. 11th, 1928. Witness Esther M. Wahrer; witness Lucile Goldsmith." This order authorized defendant to obtain the tools, dies, jigs and fixtures, and so far as the record discloses, the only reason they were not delivered to defendant immediately after the contract became effective is because it made no effort whatsoever to obtain them, never called for them and never asked the Kenosha Tie & Stamping Co. to relinquish them.

The patterns from which castings could be made were in the possession of the Badger Foundry Company, at Racine, Wisconsin, and on the same date that plaintiff gave defendant an order on the Kenosha Tie & Stamping Company, he also signed an order addressed to the Badger Foundry Company directing them to deliver to defendant all patterns in its possession which were used in the production of the master brake tester. It is apparent from the evidence that defendant never made any attempt to communicate any of the devices under its

contract, not because the tools, dies, jigs and patterns were not available, but for some other reason not disclosed of record. Defendant's counsel complain because these various tools were not actually delivered to defendant. That was not necessary under the contract. Under plaintiff's orders to the concerns which had possession of these various tools, etc., defendant was vested with all the necessary indicia of ownership of the goods, and having accepted these orders, it was incumbent upon defendant to procure the actual delivery of the property. It was so held in Webster v. Granger, 78 Ill. 230, and Van Duzor v. Allen, 90 Ill. 499, under similar circumstances. In Stock Yards Co. v. Mallory, etc. Co., 157 Ill. 554, the court said (p. 562): "When the vendor delivers to the purchaser, or to the purchaser's authorized agent, an order upon the vendor's bailee to deliver the goods sold to such purchaser or agent, there is a constructive delivery of the property; and the delivery of the order vests the purchaser with the indicia of ownership, and has the same effect in transferring the title to the property as the delivery of the property."

Notwithstanding defendant's contention that the tools, jigs, dies, etc., were never delivered, it appears that during the latter part of April, 1930, plaintiff's son, who had just graduated from college, called at the office of defendant and talked with Joseph Weidenhoff relative to entering its employ for the purpose of helping in the sale of his father's device. He then learned that defendant had not yet obtained the tools for the manufacture of the brake tester, and subsequently, at Weidenhoff's request, went to Kenosha and as a result of his trip all the tools, dies, etc., which had previously been used in the manufacture of the device, except the patterns, were shipped to defendant and have remained in its possession ever since.

counter, not because the cards, dice, [illegible] were not
available, but for some other reason not disclosed at record.
Defendant's counsel explain because these motions could were not
actually delivered to defendant. That was not necessary under
the contract. Under Plaintiff's orders to the company which had
possession of these various tanks, etc., defendant was vested with
all the necessary indicia of ownership of the goods, and having accept-
ed these orders, it was incumbent upon defendant to process the return
delivery of the property. It was so held in Cohener v. Jennett, 98
Ill. 330, and Van Duzor v. Allen, 90 Ill. 499, under similar circum-
stances. In Block Yards Co. v. Mallory, etc. Co., 187 Ill. 884, the
court said (p. 902): "When the vendor delivers to the purchaser, or
to the purchaser's authorized agent, an order upon the vendor's bail-
to deliver the goods sold to such purchaser or agent, there is a con-
structive delivery of the property; and the delivery of the order
vests the purchaser with the indicia of ownership, and has the same
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in the sale of Min Lehner's device. He then learned that defendant
had not yet obtained the tools for the manufacture of the knife
tester, and subsequently, at Weisenhorn's request, went to Kansas
and as a result of his trip all the tools, dies, etc., which had pre-
viously been used in the manufacture of the devices, except the pattern
were shipped to defendant and have remained in its possession ever
since.

It is next urged under the second defense interposed that the material which was delivered was insufficient to properly manufacture the device. Counsel does not state, and we are unable to ascertain from the record, what necessary items were missing. This was entirely a question of fact, upon which the court heard evidence, and there is nothing in the record to justify the conclusion that the court should have sustained defendant's position upon the showing made.

Under the remaining defense interposed it is urged that the contract was rescinded by mutual agreement. The affidavit of defense alleges that within four months after entering into the agreement "plaintiff and defendant mutually agreed to and did abandon the further performance of the same," and that it was an oral agreement entered into in the latter part of January, 1929. The affidavit says nothing about plaintiff's son terminating the agreement as agent for his father, but upon the trial considerable evidence was introduced in an attempt to prove that the son, as his father's agent, carried on negotiations and conversations with the Weidenhoffs, ultimately resulting in an alleged agreement to abandon the contract. This testimony was largely to the effect that on various occasions after the contract was entered into, tests of the machine were conducted on the Weidenhoff premises in the presence of plaintiff's son, who made suggestions as to changes and finally at one of the meetings indicated that he was through with the whole business, or words to that effect. The date of this alleged statement was not fixed, nor does it appear which of the Weidenhoffs was present when the agreement was supposed to have been terminated. Joseph Weidenhoff testified that the last time he saw plaintiff's son was in January, 1929. His brother, Leslie Weidenhoff, testified to a conversation he had with Pine, Jr., in the month of June, 1930. The affidavit of merits fixes the time as the

latter part of January, 1929. Plaintiff's son was a young man who had just graduated from Lawrence College, and there is no evidence to warrant the conclusion that he had authority from his father to consent to a termination or abandonment of the contract, and plaintiff specifically denied that he had ever authorized his son to act as his agent in that respect. Furthermore, it appears from the undisputed evidence that at the time of the alleged rescission defendant was in default as to every provision of the contract and therefore was in no position to rescind. The tools, dies, fixtures, etc., were all in the possession of defendant, and no attempt was ever made to return them to plaintiff. In 6 Ruling Case Law, sec. 319, p.936, "Contracts", the author says "the very idea of rescinding a contract implies that what has been parted with shall be restored on both sides." At best this was a question of fact, and from a careful examination of the record we do not see how the court could have held with defendant in its contention on the question of mutual rescission or abandonment.

On oral argument defendant's counsel relied largely upon the proposition that there is nothing in the agreement which compelled defendant either to manufacture or sell the device. They take the position that defendant was not obliged to pay anything until the device was manufactured and sold, and in support of that contention rely on several decisions cited in defendant's brief. The first of these is Dixie Cotton Picker v. Bullock, 188 Fed. 921, which was a bill in equity seeking to cancel a contract rather than to enforce one, as in the instant proceeding. The contract contained a clause under which the licensee agreed "to be diligent in supplying the market with sufficient machines to meet the demand of the market therefor," and the court held that this clause could not be construed as an obligation to manufacture. The agreement in the instant proceeding indicates a clear intention of the parties that plaintiff's device should be manu-

factured and sold by the licensee.

Duer v. Chicago Coach Co., 194 Ill. App. 314, included a prayer for an accounting for royalties due, and the question arose as to whether or not the licensee was obliged to manufacture the articles in question. The court held that one seeking to recover royalties for the manufacture of a patented article under a license need not allege and prove that the manufacture thereof was practicable and profitable when the license did not bind the licensee to continue should it prove impracticable or unprofitable to do so. However, that conclusion was justified by two clauses in the contract, the first of which provided that "there is nothing in these articleswhich bind the said party of the second part (licensee) to continue in the manufacture of automobiles under the aforementioned patents should the production thereof be impracticable or unprofitable," and the second of which stipulated that "in case the second party (licensee) shall cease to manufacture automobiles or otherwise fail to make use of the right to manufacture under the aforesaid patents, then any exclusive rights granted by this agreement shall be void." That decision is distinguishable from the instant proceeding because no such provision appears in the contract between the parties herein. Other cases cited by defendant's counsel may be distinguished because of special circumstances appearing in those cases.

It is also urged by defendant that plaintiff did not prove his case by a preponderance or greater weight of the evidence, that there is a fatal variance between plaintiff's allegations and his proof, and that the court erred in striking some of the defenses set up in defendant's affidavit of merits. So far as the preponderance of the evidence is concerned, we have examined the record carefully and believe the trial court's findings and judgment are fully sustained by the record. The contention that there was a fatal variance

tained by the record. The contention that there was a total failure and believe the trial court's findings are judgment are fully sup-

of the evidence is concerned, we have described the tenor generally mb in defendant's affidavit of merits. So far as the performance proof, and that the court erred in striking some of the defenses set there is a total variance between plaintiff's allegations and his his case by a preponderance or greater weight of the evidence. What

Other cases cited by defendant's counsel may be distinguished because of special circumstances appearing in those cases.

It is also urged by defendant that plaintiff did not prove such provision appears in the contract between the parties hereto. doubtless is distinguishable from the instant proceeding because no exclusive rights granted by this agreement shall be void." That of the right to manufacture under the aforesaid patents, upon any small cases to manufacture automobiles or otherwise full in which was second of which stipulated that "in case the second party (licensee) the production thereof be impracticable or unprofitable," and the mand the said party of the second part (licensee) to continue in the manufacture of automobiles under the aforementioned patents should fact conclusion was justified by the clause in the contract, the first of which provided that "there is nothing in these articles should it prove impracticable or unprofitable to do so. However, and profitable when the license did not bind the licensee to continue need not allege and prove that the manufacture thereof was practicable

-2-

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Thies v. State Life Insur. Co., 134 Ill. App. 214, brought a

prayer for an accounting for royalties due, and the question arose as to whether or not the licensee was obliged to manufacture the articles in question. The court held that one seeking to recover royalties for the manufacture of a patented article under a license need not allege and prove that the manufacture thereof was practicable and profitable when the license did not bind the licensee to continue should it prove impracticable or unprofitable to do so. However, that conclusion was justified by the clause in the contract, the first of which provided that "there is nothing in these articles bind the said party of the second part (licensee) to continue in the manufacture of automobiles under the aforementioned patents should the production thereof be impracticable or unprofitable," and the second of which stipulated that "in case the second party (licensee) shall cease to manufacture automobiles or otherwise fail in using any of the right to manufacture under the aforesaid patents, then any exclusive rights granted by this agreement shall be void." That decision is distinguishable from the instant proceeding because no such provision appears in the contract between the parties hereto. Other cases cited by defendant's counsel may be distinguished because of special circumstances appearing in those cases.

It is also urged by defendant that plaintiff did not prove his case by a preponderance or greater weight of the evidence. What there is a total variance between plaintiff's allegations and his proof, and that the court erred in striking some of the defenses set up in defendant's affidavit of merits. So far as the performance of the evidence is concerned, we have described the tenor generally and believe the trial court's findings are judgment are fully sup-

between plaintiff's allegations and his proof is based upon the contention that plaintiff should have been required to prove, as he alleged, that he was the owner of the patent for the brake testing device. When the agreement was made application for the patent was pending, and under the contract defendant actually enjoyed the exclusive right which it sought and plaintiff gave up all right to manufacture or to license others to manufacture. (Myers v. Gerhardt, 344 Ill. 620, 626; Marston v. Swett, 66 N. Y. 206.) The patent subsequently issued in 1930, and defendant cannot excuse its failure to respond in damages under the circumstances because no attempt was ever made to manufacture and sell the devices, either before or after issuance of letters patent. The remaining contention that the court erred in striking some of the defenses interposed cannot be raised on appeal, since defendant filed a new affidavit of merits and was evidently willing to abide by the court's ruling at the time.

We find no convincing reasons for reversal of the judgment of the circuit court, and it is accordingly affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

Keenan and Sullivan, 22, supra.

of the circuit court, and it is accordingly affirmed.

We find no convincing reasons for reversal of the judgment

the time.

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that the court erred in striking some of the defenses initially,

before or after issuance of letters patent. The remaining contention

attempt was ever made to manufacture and sell the devices, either

failure to respond in damages under the aforementioned provisions the

patent subsequently issued in 1950, and defendant cannot excuse its

Corporation, 344 Ill. 600, 606; Keeling v. Speed, 89 F. 2d. 402.) The

to manufacture or to license others to manufacture. (Dobbs v.

39593

JOHN MUSCHELEWICZ and JOSEPH S. CZECHANSKI and STANLEY J. NOWICKI,
Appellees,

vs.

JAMES O. KOONTZ and HELEN KOONTZ,
Appellants.

CALUMET CITY STATE BANK, Individually and as Mortgagee, and WILLIAM L. O'CONNELL, Receiver of CALUMET CITY STATE BANK,
Defendants.

) APPEAL FROM SUPERIOR
) COURT OF COOK COUNTY.

13A

294 I.A. 604

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

John Muschelewicz brought suit to foreclose a trust deed made by James O. Koontz and Helen Koontz, his wife, as security for five principal promissory notes aggregating $2400. Pursuant to the entry of a decree, sale was held by a special commissioner, the property was bid in by plaintiff, John Muschelewicz, and a certificate of sale issued. Subsequently Joseph S. Czechanski and Stanley J. Nowicki became the owners of the certificate of sale, and after the expiration of the period of redemption a special commissioner's deed was issued, conveying the premises to them as joint owners thereof. After receiving the deed the grantees filed a petition in the superior court, where the proceeding had been pending, for a writ of assistance seeking possession of the premises. Koontz filed an answer to the petition, and on January 19, 1937, the court ordered that a writ of assistance issue to put the petitioners in possession. Koontz and his wife have appealed from that order.

The petition for writ of assistance filed by Czechanski and Nowicki on November 28, 1936, set forth the material facts relating to the foreclosure, alleged that the period of redemption had expired and that a special commissioner's deed had issued to them as assignees of the special commissioner's certificate of sale; that the property

30983

JOHN EUGENE TRUX and JOSEPH J. CHAMBERS, and CLARENCE J. DOWLING, Appellees,

vs.

JAMES O. SCHULTZ and HENRY KOCH, Appellants.

CALUMET CITY STATE BANK, individually and as Mortgagee, and WILLIAM J. O'DONNELL, Receiver of CALUMET CITY STATE BANK, Intervenors.

294 I.A. 60

MR. PRESIDING JUSTICE MILLER DELIVERED THE OPINION OF THE COURT.

John Augustus Stockwell built to foreclose a trust deed made by James O. Koontz and Lena Koontz, his wife, as security for five principal promissory notes aggregating $7500. Interest to the entry of a decree, said was held by a special commissioner, the property was bid in by plaintiff, John Augustus Stockwell, and a certificate of sale issued. Subsequently George C. Stockwell and Stanley J. Kowlok became the owners of the certificate of sale, and after the expiration of the period of redemption a special commissioner's deed was issued, conveying the premises to them as joint owners thereof. After receiving the deed the grantees filed a petition in the superior court, where the proceeding had been pending, for a writ of assistance awarding possession of the premises. Koontz filed no answer to the petition, and on January 12, 1937, the court ordered that a writ of assistance issue to put the petitioners in possession. Koontz and his wife have appealed from that order.

The petition for writ of assistance filed by assignment and Kowlok on November 23, 1936, set forth the material facts pertaining to the foreclosure, stating that the period of redemption had expired and that a special commissioner's deed had issued to them as assignees of the special commissioner's certificate of sale, that the premises

was improved with a one-story frame building which had been occupied by James O. Koontz, one of the defendants, during the period of redemption, and that he was still in possession; that notwithstanding demand had been made upon him for possession of the premises, Koontz had refused to surrender possession; and the petition prayed for a writ directing the sheriff to put them in possession without further delay.

Koontz's answer to the petition averred in substance that December 9, 1936, subsequent to the expiration of the period of redemption and after the deed had issued, he made an oral agreement with Nowicki whereby Koontz promised to execute a quitclaim deed and deliver possession of the premises to Nowicki, and in consideration for that promise Nowicki undertook to deliver a satisfaction of the deficiency judgment which had been entered against Koontz August 9, 1935, also to pay Koontz $25 in cash and to lease the premises to Koontz for a period of six months from January 1st to July 1st, 1937, at a monthly rental of $12. He averred that he was at all times ready to perform the agreement and had called at the office of Nowicki's attorney for the purpose of carrying out its terms, but that Nowicki refused to pay him the $25 as agreed, refused to deliver a satisfaction of the deficiency, and refused otherwise to perform any of the terms of the agreement.

During the pendency of this appeal petitioners moved to dismiss the same on jurisdictional grounds. The motion was allowed, and the appeal was dismissed October 26, 1937. A mandate issued, and on November 15, 1937, Koontz was evicted from the premises by the sheriff. Subsequently, acting as attorney pro se, Koontz asked for leave to file an additional transcript of record supplying the missing jurisdictional order which had not been included in the original transcript, and moved to set aside the order dismissing the appeal. His motion was allowed December 9, 1937, after he had been evicted,

and the appeal was reinstated. Since then Koontz has filed various other motions, including one that an order be entered by this court vacating, quashing and setting aside the writ of assistance issued out of the superior court clerk's office on November 12, 1937, and that a writ of assistance issue out of this court commanding the sheriff of Cook county to forthwith eject and remove Czechanski and Nowicki, their tenants, agents, attorneys and servants, and all persons claiming through them, from the premises in question, and that they be enjoined pending the final disposition of this appeal from interfering in any manner whatsoever with the possession and quiet enjoyment of the real estate in question; and also a motion for a rule on certain of the defendants to show cause why they should not be punished for contempt of court for evicting him from the premises.

When the cause came on for oral argument, Koontz did not see fit to discuss any of the points raised in his brief as ground for reversing the order of the superior court issuing the writ of assistance from which he had appealed, but asked this court to defer its decision on the merits of the appeal until after a writ of assistance had been issued by this court restoring him to possession of the premises. He stated to the court that he wanted a ruling on that motion so that if it was determined adversely to him he might prosecute a further appeal on the ruling to the supreme court. He takes the position that since the appeal was reinstated after having been properly dismissed on jurisdictional ground, he is entitled to be restored to possession before the merits of the order from which he appealed are determined in this court, notwithstanding the fact that he was evicted under a mandate of this court after the appeal had been dismissed and before the reinstatement order was entered.

As ground for reversal Koontz first contends in his brief that the petition for writ of assistance failed to state a good cause

of action, because the allegations of ownership of the special commissioner's certificate are insufficient, because the petition does not properly allege the issuance of a deed after the expiration of the period of redemption, and because it does not sufficiently set forth that Koontz was in possession of the premises. None of these objections was urged in Koontz's answer to the petition, nor raised upon the hearing before the chancellor, and therefore they cannot be raised for the first time on appeal. (Vlahos v. Andrews, 362 Ill. 593, 597, 598). Moreover, the petition for writ of assistance sufficiently stated that the petitioners were the assignees of the purchaser at the sale, that the period of redemption had expired, and that a special commissioner's deed had issued to them. These allegations were sufficient, in the absence of any denial on the part of Koontz, to entitle them to possession of the premises.

The remaining ground for reversal relates to the failure of petitioners to carry out their oral agreement with Koontz, as averred in his answer. On the hearing before the chancellor Koontz testified in substance that Nowicki, one of the petitioners, had agreed with him (a) to give Koontz $25 for a quitclaim deed; (b) to satisfy the deficiency judgment; and (c) to rent the premises to him for six months, from January 1st to July 1st, 1937, at a rental of $12 a month. Helen Koontz corroborated the testimony of her husband, but when the court interrogated her about vacating the premises she made the following reply:

"A. Well, we promised, we said we would vacate if he paid us; he said himself, he would give us Twenty-five Dollars ($25.00) and we agreed to vacate."

Petitioners admit that they had offered $25, but insist that this sum was to be given to Koontz upon vacating the premises and for the purpose of avoiding eviction costs and delay, and this position is substantiated by the statement of Helen Koontz, as above set forth. Furthermore, petitioners take the position that they made no such

agreement, and they point out that it would have been impossible for Nowicki to give Koontz a satisfaction of the deficiency judgment, because Nowicki was not the judgment creditor.

There is no merit whatsoever in Koontz's appeal. Petitioners were clearly entitled to possession of the premises, and the defenses interposed are untenable and not sustained by the record. We are of the opinion that the superior court properly ordered the writ to issue, and that is the only question raised by this appeal. The order of the superior court issuing the writ of assistance is therefore affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

agreement, and they point out that it would have been impossible for Howlett to give Moore a satisfaction of the defendant's judgment, because Howlett was not the judgment creditor.

There is no merit whatsoever in Moore's appeal. Petitioners were clearly entitled to possession of the premises, and the damages interposed are untenable and not supported by the record. We are of the opinion that the superior court properly ordered the writ to issue, and that is the only question raised by this appeal. The order of the superior court issuing the writ of assistance is therefore affirmed.

Keenan and Sullivan, JJ., concur.

39875

JULIUS PELKEY,
Appellee,

v.

R. F. EAGLE and VIRGINIA EAGLE,
Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

294 I.A. 604

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in tort for personal injuries resulting from a collision with an automobile owned by R. F. Eagle and driven by his daughter, Virginia Eagle. The jury returned a verdict in favor of plaintiff for $18,500, upon which judgment was entered, and both defendants appeal.

The accident occurred around nine o'clock on the evening of April 12, 1936, at or about the intersection of Longwood drive and 111th street, in Morgan Park. The undisputed facts disclose that 111th street runs in an easterly and westerly direction, is paved with macadam and has double street car tracks down the center. Longwood drive is also paved with macadam and intersects 111th street approximately at right angles, but with a slight curve as it crosses 111th street, so that north of 111th Longwood drive veers a little to the northeast, and south of 111th somewhat to the southeast. The streets are approximately the same width from curb to curb. The neighborhood is a combination of stores and residences. A park is located on the northeast corner; on the southeast corner there was a vacant bank building; on the northwest corner a gasoline filling

30075

JUSTICE [illegible],

Appellee,

v.

R. P. EAGLE and VIRGINIA EAGLE,
Appellants.

COURT, COOK COUNTY.

294 I.A. 604

MR. JUSTICE JUSTICE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in tort for personal injuries resulting from a collision with an automobile owned by R. P. Eagle and driven by his daughter, Virginia Eagle. The jury returned a verdict in favor of plaintiff for $10,000, upon which judgment was entered, and both defendants appeal.

The accident occurred around nine o'clock on the evening of April 12, 1936, at or about the intersection of Longwood drive and 111th street, in Morgan Park. The undisputed facts disclose that 111th street runs in an easterly and westerly direction, is paved with macadam and has double street car tracks down the center. Longwood drive is also paved with macadam and intersects 111th street approximately at right angles, but with a slight curve as it crosses 111th street, so that north of 111th Longwood drive veers a little to the northeast, and south of 111th somewhat to the southeast. The streets are approximately the same width from curb to curb. The neighborhood is a combination of stores and residences. A park is located on the northwest corner; on the southwest corner there was a vacant bank building; on the northeast corner a building 111th

station, and on the southwest corner a drug store. Close to the intersection of the east curb of Longwood drive and the north curb of 111th street was a stop and go traffic signal, the lights of which show east and west but not north and south. On the northwest corner was a similar traffic signal for north and south bound traffic.

On the day in question R. F. Eagle, accompanied by his wife, his daughter Virginia, and one Virginia Brengle, a classmate of his daughter at the University of Kansas, who was visiting defendants during the Easter vacation, had spent the day at Three Rivers, Michigan, about 125 miles from Chicago. On the return trip Virginia Eagle, who had driven automobiles for a number of years, drove the party back to Chicago in a new Oldsmobile, which, according to the evidence, was in good mechanical condition. They left Three Rivers between 4:30 and 5:00 o'clock p.m. The Eagles lived at 2137 W. 111th street, about four blocks from the scene of the accident. On the return trip from Three Rivers Virginia sat in the left front seat driving, Virginia Brengle beside her at the right, Mrs. Agnes C. Eagle in the right rear seat, and R. F. Eagle beside her to the left. When the party reached Hale avenue, a north and south street running practically parallel with Longwood drive and a block east thereof, Mr. Eagle got out of the car at a store one-half block north of 111th street, for the purpose of purchasing some food for the Sunday night supper. Virginia Eagle then drove south on Hale avenue one-half block, turned to the right, or west, on 111th street, crossed some railroad tracks which parallel Hale avenue, and continued west on 111th street across Longwood drive.

Only two occurrence witnesses testified on behalf of plaintiff. Robert H. Dubois, one of these, said that after making some purchases at the drug store on the southeast corner he entered his Chevrolet sedan, which was parked at the west curb of Longwood drive,

about 25 feet south of 111th street, and was preparing to start his car. His evidence is based on what he saw through the rear vision mirror of his car. He first noticed plaintiff close to the curb on the west side of Longwood drive, on the south side of 111th street. He testified that plaintiff hesitated at the south curb a moment, seemed confused, and then started across 111th street along the west crosswalk of Longwood drive. According to his best judgment, plaintiff was possibly "I would say, maybe two or three feet from the sidewalk intersection at the time the car made contact; that may have been because he ran away from the car." When the automobile stopped it was west of the plaintiff, who was then lying approximately four feet west of the driveway leading into the oil station on the north side of 111th street. According to Dubois, the intersection was lighted with two ordinary street lamps and seemed dingy on the night in question, and portions thereof were obscured by shadows from trees along the northwest intersection of the two streets. Dubois could not tell whether plaintiff was hit by the automobile or whether he ran into defendants' car.

In his own behalf plaintiff testified that he had been working as a watchman for the W.P.A. in the vicinity of 111th street and Longwood drive for three or four nights. Just prior to the accident he was on his way to a toilet in the rear of a gasoline station at the northwest corner, where he had gone on three other occasions. The toilet was located approximately 40 or 50 feet west of the west crosswalk. Plaintiff testified that after he walked north on the west side of Longwood drive he stopped at the curb for about two minutes, looked east and west, saw no traffic whatsoever, and that there was nothing to obstruct his view. He then looked at the traffic lights on the west side of Longwood drive north of 111th

about 85 feet south of 111th street, and was stepping to start his car. His evidence is based on what he saw through the rear view mirror of his car. He first noticed plaintiff close to the curb on the west side of Longwood drive, on the south side of 111th street. He testified that plaintiff hesitated at the sewer but a moment, turned southward, and then started across 111th street along the west crosswalk of Longwood drive. According to his judgment, plaintiff was possibly 7 or 8 feet from the sidewalk intersection at the time the car made contact that may have been because he ran away from the car." When the automobile stopped it was west of the plaintiff, who was then lying approximately four feet west of the driveway leading into the oil station on the north side of 111th street. According to Smoak, the intersection was lighted with two ordinary street lamps and morning on the night in question, and portions thereof were obscured by shadows from trees along the northeast intersection of the two streets. Dubois could not tell whether plaintiff had hit by the automobile or whether he ran into defendant's car.

In his own behalf plaintiff testified that he had been working as a watchman for the T.P.A. in the vicinity of 111th street and Longwood drive for three or four nights. Just prior to the accident he was on his way to a toilet in the rear of a gasoline station at the northwest corner, where he had gone on three other occasions. The toilet was located approximately 60 or 80 feet west of the automobile. Plaintiff testified that after he walked north on the west side of Longwood drive he stopped at the curb for about two minutes, looked east and west, saw no traffic whatsoever, and that there was nothing to obstruct his view. He then looked at the traffic light on the west side of Longwood drive north of 111th

street, saw the lights were green, and started to walk across the west crosswalk. When he got beyond the north rail of the west bound street car tracks he saw the headlights of an automobile. The lights turned slightly to the right, and he was struck at the same time. "Then I don't remember nothing. I got dragged a little bit, I remember. When I got a bang on my head. Since then I don't remember nothing what happened. *** The next recollection I have of what was going on around me was when the wheel ran over my arm; that's as far as I know. At the same time I got hit on my head, so I was unconscious. I don't know nothing."

Raymond Sanders, an attendant at the gasoline filling station, testified that he was busy at the time of the impact, filling an automobile at the pumps to the east of the station, and did not actually see the accident. Immediately thereafter a crowd gathered, and he then went over to where the plaintiff lay, on the outer rail of the west bound street car track, about 40 feet west of the west crosswalk of Longwood drive. Bystanders then moved plaintiff straight north, to the curb. Sanders further testified that the entrance to the toilet is through the office in the front of the filling station, the front door of which faces Longwood drive, and that "you have to go to the rear of the building to use the washroom *** As to whether or not there is an entrance to the men's toilet from the rear of the building, you can get in that way if you want to if the pit doors are open. I believe the pit doors were open that night. Customarily persons entering the toilet enter it from the front. The pit opens from the east. There is no way you can get into the toilet by entering from the west, or rear, side of the building." Sanders further said that the space between the driveway to the filling station and the sidewalk on the west side of Longwood drive, north of 111th street, was approximately 15 feet, and that the driveway leading into the

"Then I don't remember nothing. I just dreamed a little bit, I remember. Then I got a bang on my head. Since then I don't remember nothing what happened. *** The next recollection I have of what was going on around me was when the chief [illegible] by name; that's as far as I know. At the same time I got hit on my head, so I was unconscious. I don't know nothing."

Beyond Sanford, an attendant at the Pacific Filling station testified that he was busy at the time of the impact, filling an automobile at the pumps to the east of the station, and did not personally see the accident. Immediately thereafter a second explosion, and he then went over to where the plaintiff lay, on the outer rail of the west bound street car track, about 40 feet west of the west crosswalk of Longwood drive. Bystanders then moved plaintiff [illegible] north, to the curb. Sanford further testified that the entrance to the Pacific through the office in the front of the filling station, the front door of which faces Longwood drive, and that "you have to go to the rear of the building to use the restroom one is to whether or not there is an entrance to the men's toilet from the rear of the building. You can get in that way if you want to if the pit doors are open. I believe the pit doors were open that night. Incidentally persons entering the toilet enter it from the front. The pit opens from the east. There is no way you can get into the toilet by entering from the west, or rear, side of the building." Sanford further said that the space between the driveway by the filling station and the sidewalk on the west side of Longwood drive, north of fifth street was approximately 15 feet, and that the driveway leading into the

filling station was 12 or 14 feet wide. The accident occurred west of the driveway, or approximately 40 to 50 feet west of the west sidewalk on Longwood drive.

Dr. Calvert H. Lane, who lived about 350 feet from the scene of the accident, arrived while plaintiff was still lying in the street, and was thoroughly familiar with the intersection. He testified that the intersection was not well lighted, and that 111th street as it went uphill west of Longwood drive was rather dark. Without a flashlight Dr. Lane could not determine whether plaintiff was a white or colored man. When Dr. Lane arrived plaintiff was lying 50 to 60 feet west of the northeast corner of 111th and Longwood drive, and west of the driveway leading into the filling station.

Harry Craig, a Chicago police officer stationed at the Morgan Park police station, testifying on behalf of defendants, said that upon his arrival at the scene of the accident he found plaintiff lying in the street at a point two or three feet west of where the driveway led into the filling station, and that a large elm tree on the parkway cast a shadow upon the hill. He held the flashlight while Dr. Lane examined plaintiff. After the accident Craig examined the automobile and found the left front door handle bent, with some blood on it, and a dent at the back of the left front door, near the top. He also examined the front of the automobile and found no marks or dents of any kind. The surface of the street was reasonably dry, and there were no marks on it.

Officer Joseph Cooney accompanied Craig to the scene of the accident, and testified that he found plaintiff lying in 111th street, about 45 feet west of Longwood drive, and two or three feet west of the driveway. He saw Dr. Lane use a flashlight in making an examination of plaintiff, and testified to the direction of the cross streets at the intersection.

filling station was 10 or 12 feet wide. The accident occurred west of the driveway, or approximately 40 to 50 feet west of the east sidewalk on Lonewood drive.

Dr. Calvert R. Lane, who lives about two feet from the scene of the accident, arrived while plaintiff was still lying in the street, and was shortly familiar with the intersection. He testified that the intersection was not well lighted, and that little except as it went uphill west of Longwood drive was rather dark. Without a flashlight Dr. Lane could not determine whether plaintiff was a white or colored man. When Dr. Lane arrived plaintiff was lying 80 to 60 feet west of the northeast corner of Hill and Longwood drive, and west of the driveway leading into the filling station.

Harry Craig, a Ohio-Apco police officer stationed at the Dodge Park police station, testifying on behalf of defendants, said that upon his arrival at the scene of the accident he found plaintiff lying in the street at a point two or three feet east of where the driveway led into the filling station, and that a large elm tree on the parkway cast a shadow upon the hill. He held the flashlight while Dr. Lane examined plaintiff. After the accident Craig examined the automobile and found the left front door handle bent, with some blood on it, and a dent at the back of the left front door, near the top. He also examined the front of the automobile and found no marks or dents of any kind. The surface of the street was reasonably dry, but there were no marks on it.

Officer Joseph Cooney accompanied Craig to the scene of the accident, and testified that he found plaintiff lying in Hill street, about 45 feet west of Longwood drive, and two or three feet east of the driveway. He saw Dr. Lane use a flashlight in making an examination of plaintiff, and testified to the direction of the cross streets at the intersection.

Virginia Brengle, 22 years of age, testified on behalf of defendants that she was a classmate of Virginia Eagle at the University of Kansas. She was seated in front to the right of the driver, said that she had driven automobiles for four or five years, that after Mr. Eagle had left the car they crossed the suburban railroad tracks, a short block east of Longwood drive, that at the time they crossed the tracks the traffic lights at the northeast corner of Longwood drive and 111th street were red, for east and west traffic, but by the time the automobile reached the middle of the block, these traffic lights had changed from red to amber to green, and continued green at the time the automobile reached Longwood drive and so remained all the way across Longwood drive. She said that the car was proceeding in a westerly direction, about 12 to 15 miles an hour, straddling the north or outer rail of the westbound street car tracks, that when the automobile was two car lengths west of the west crosswalk of Longwood drive and going up the incline, she for the first time noticed plaintiff ahead to her left or southwest of the car, that he was then running in a diagonal direction across 111th street toward the northwest with his head down. When she first observed plaintiff he was about 10 or 15 feet away. Virginia Eagle apparently saw plaintiff about the same time, and immediately honked the horn, put on the brakes and swerved the car to her right or north toward the curbstone. She said that these actions were practically simultaneous; that Pelkey was then five or six feet away, but still slightly to the left and southwest of the automobile; that he continued to run at the same speed, without looking to the east, that he struck the left front door of the car at the handle, and disappeared. She said that no part of the front of the automobile came in contact with plaintiff, and the street was dark at the site of the accident.

the accident.

Agnes C. Eagle, Virginia's mother, who was sitting in the right rear seat, testified that after letting Mr. Eagle out on Hale avenue her daughter drove the car west on 111th street, that as they approached Longwood drive the traffic lights were green in their favor, and her daughter thereupon continued across Longwood drive. As they passed the intersection and were west of the driveway leading into the gasoline filling station, plaintiff loomed up coming very fast from the southwest and was sort of zigzagging toward the northwest, running right into the side of the car at the left front door. Mrs. Eagle had never driven a car and was not a good judge of speed, but said that they were not going fast, and estimated the speed at about 20 miles an hour.

Virginia Eagle, the driver of the automobile and one of the defendants, testified that she had driven cars for about nine years. This particular automobile was a five-passenger Oldsmobile, about a month old, in good mechanical condition. As she came across the railroad tracks she noticed the traffic lights on the northeast corner of Longwood drive and 111th street were red. They turned to amber and then to green as she approached Longwood drive, and so continued across the drive. She said that she was driving approximately fifteen miles an hour, straddling the north rail of the west bound car track, and that there were no other automobiles on either 111th street or Longwood drive. When her automobile was about three car lengths up the hill west of Longwood drive she saw plaintiff for the first time. He was then running northwest, and was about five feet to the left, or west, of her automobile. She immediately sounded her horn, swerved to his right and applied the brakes, all about the same time. Plaintiff continued to run in a northwesterly direction, without changing the speed, and struck the left side of the automobile at the front door, right beside where she was sitting. Plaintiff

fell to the ground, and according to the witness the impact did not knock or carry him in a westerly direction. She stopped her automobile in about three car lengths, alighted and saw plaintiff lying near the north rail. People gathered almost immediately, she got back into her car, and turned it around so that it was headed east on the south side of the street, where she parked it at the south curb. She said that when she got into the car to turn it around she noticed blood on the front door handle. At the place of impact the street was dark, caused by shadows from trees along the curb.

As ground for reversal defendants urge that the verdict and judgment are contrary to and not supported by the evidence, and their counsel urge this court to reverse the judgment without remanding, because, as they contend, of the total lack of evidence showing negligence on the part of defendants and also because of the failure of plaintiff to show, either by his own testimony or that of any occurrence witness, that he was in the exercise of ordinary care for his own safety at the time and immediately preceding the accident. Although we believe that plaintiff made out a prima facie case and we would therefore not be justified in holding as a matter of law that there is no evidence to support the verdict on either ground, we have reached the conclusion, after a careful examination of the record, that the verdict is contrary to the manifest weight of the evidence, especially in so far as it indicates that plaintiff was in the exercise of ordinary care for his own safety. Some of the evidence relating to this question is quite indefinite. It is difficult to ascertain from the record, with any degree of certainty, whether access to the men's toilet could be had through the rear of the filling station, and this fact is important as bearing upon the question whether plaintiff crossed 111th street

along the crosswalk or in a diagonal direction. Upon retrial this situation can be more clearly shown.

In view of these conclusions, it will be unnecessary to discuss defendants' further contention that the verdict is excessive.

The judgment of the Circuit court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan and Sullivan, JJ., concur.

sions, the judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

Bowman and Sullivan, JJ., concur.

39388

ALICE BYRAM HOWARD, individually and as executrix under the last Will and Testament of Harold A. Howard, Deceased (Plaintiff), Appellee,

v.

MARY KATHERINE JONES ORMONDE (Defendant and Counter-Claimant), Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

294 I.A. 604

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure and sale in a suit brought for the foreclosure of three trust deeds executed and delivered by Mary Katherine Jones Ormonde, defendant and counter-claimant.

The verified complaint alleges that on May 2, 1927, defendant executed and delivered her five principal promissory notes in the sum of $5,000 each, together with certain interest coupons, which notes and coupons were secured by a first mortgage trust deed on certain premises, duly executed by defendant; that on June 20, 1929, she executed and delivered her one principal promissory note in the sum of $10,000, together with interest coupons, and at the same time delivered her second mortgage trust deed on the same premises; that on December 20, 1930, she executed and delivered her one principal promissory note in the sum of $5,000, together with interest coupons, which note and coupons were secured by a third mortgage trust deed of the same date on the same premises. The complaint further alleges that plaintiff, Alice Byram Howard, was the holder and owner of the notes and unpaid interest coupons secured by the first mortgage trust deed and that plaintiff Harold

MR. JUSTICE SOARLES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure and sale in a suit brought for the foreclosure of three trust deeds executed and delivered by Mary Katherine Jones Dymond, defendant and counter-claimant.

The verified complaint alleges that on May 2, 1927, defendant executed and delivered her five principal promissory notes in the sum of $5,000 each, together with certain interest coupons, which notes and coupons were secured by a first mortgage trust deed on certain premises, duly executed by defendant; that on June 30, 1929, she executed and delivered her one principal promissory note in the sum of $10,000, together with interest coupons, and at the same time delivered her second mortgage trust deed on the same premises; that on December 30, 1930, she executed and delivered her one principal promissory note in the sum of $5,000, together with interest coupons, which note and coupons were secured by a third mortgage trust deed of the same date on the same premises. The complaint further alleges that plaintiff, Alice Byram Howard, was the holder and owner of the notes and unpaid interest coupons secured by the first mortgage trust deed and that plaintiff Harold

29414 604

ALICE BYRAM HOWARD, individually and as executrix under the last will and testament of Harold [illegible], Howard, Deceased (Plaintiff),

Appellee,

v.

MARY KATHERINE JONES DYMOND (Defendant and Counter-Claimant),

Appellant.

COURT, COOK COUNTY.

A. Howard was the holder and owner of the notes and unpaid interest coupons secured by the second and third mortgage trust deeds, respectively; that there had been paid upon the principal note secured by the second mortgage trust deed the sum of $6,464.35, leaving a balance due thereon in the amount of $3,535.65. The complaint alleges certain defaults in payments due and prays for the foreclosure of the three mortgages.

Defendant filed a verified answer wherein she denies that plaintiff is entitled to the relief prayed for in the complaint. She also filed a counter-claim wherein she alleges that at the time of the execution and delivery of the trust deeds sought to be foreclosed, and the principal notes and interest coupons secured thereby, a fiduciary relationship existed between her and Harold A. Howard; that the transactions that resulted in the execution and delivery by her to said Howard of the three mortgages sought to be foreclosed, were inequitable and unfair, and that the said mortgages were obtained by said Howard, by virtue of the confidential relationship, for an inadequate consideration, and that, therefore, under such circumstances, he ought not, according to the rules of equity and good conscience, be permitted to foreclose the same. The prayer of the counter-claim is that the trust deeds and any and all notes secured thereby be cancelled, annulled, rescinded and set aside, and that an accounting be taken of any and all transactions between defendant and said Howard; that defendant offers to come to a full and fair accounting with said Howard and to pay to him whatever, if anything, should appear to be due to him from her.

The master to whom the cause was referred found that Alice Byram Howard, plaintiff, was the legal holder and owner of five principal notes and certain unpaid interest notes secured by the first mortgage trust deed; that default had been made in the payment of certain interest notes and that plaintiff elected to and did

declare all of the indebtedness secured by the said trust deed to be immediately due and owing; that the total amount due plaintiff besides the costs and expenses of the proceedings was $30,708.91, and the master recommended that a decree of foreclosure be entered as to the first mortgage trust deed. The master further found that Harold A. Howard was the owner of the principal note and interest notes secured by the second mortgage trust deed; "that all interest coupons, aggregating the sum of $3,250, pertaining to said $10,000 note dated June 20, 1929, have been paid; that the sum of $6,464.35 has been paid on the principal of said note, and a commission of $500 was paid for said loan, which made said loan usurious as hereinbefore found, and the defendant and counter-claimant * * * is therefore entitled to a total credit of * * * $10,214.35, being $214.35 in excess of the principal of said note; that the said sum of $214.35 should be credited against any sum that may be due upon the note for $5,000 dated December 20, 1930, secured by the trust deed [third mortgage trust deed] recorded as Document No. 10819364." The master further found that Harold A. Howard was the holder and owner of the principal note for the sum of $5,000 secured by the third mortgage trust deed; "that the coupons of series #1 to #7, aggregating $1,225, pertaining to said principal note dated December 20, 1930, have been paid and a commission of $250 was paid for said loan, which made said loan usurious as hereinbefore found; that the defendant and counter-claimant * * * is therefore entitled to a credit in the amount of $1,789.35 to be applied against the principal of said note, which credit consists of the $1,225 paid upon interest coupons #1 to #7, $250 paid as commission for said loan, and the $214.35 * * *, leaving a balance of $3,210.65 unpaid upon the principal of said note; that there is due * * * Harold A. Howard the further sum of $10,000 by reason of his advancement on March 1, 1935, of that

amount in payment of taxes upon the premises involved herein. There is therefore due * * * Harold A. Howard from the defendant and counter-claimant * * * the sum of $13,210.65, consisting of the balance of $3,210.65 unpaid upon said note dated December 20, 1930, and the said sum of $10,000 advanced for taxes."

A decree was entered in accordance with the findings and recommendations of the master.

Defendant contends that the master and the trial court erred in not holding that a fiduciary relationship existed between defendant and Harold A. Howard at the time of the execution and delivery of the first mortgage trust deed and principal notes and interest coupons thereby secured; that the commission of $750 deducted by said Howard at the time of the making of said loan constituted a profit to which he was not entitled as a matter of law and that defendant is entitled to a credit for that amount; that defendant is also entitled to a credit for all interest she paid on account of said first mortgage and that "said plaintiff is entitled solely to repayment of moneys actually advanced by him."

The facts were stipulated.

To quote from the able and exhaustive report filed by the master:

"28. That it appears from the evidence that the plaintiff, Harold A. Howard, is now about the age of sixty-eight years, and that the defendant * * * is now about the age of seventy-one years; that * * * [Harold A. Howard] has personally known and has been acquainted with defendant for approximately fifty years.

"29. That for a period of more than fifteen years next preceding the filing of the complaint in this cause, and for several years prior to May 10, 1921, defendant * * * was seized in whole or in part of the fee simple title to certain improved real estate

amount in payment of taxes upon the premises involved herein. There is therefore due * * * Harold A. Howard from the defendant and counter-claimant * * * the sum of $15,110.85, consisting of the balance of $3,210.85 unpaid upon said note dated December 2d, 1930, and the said sum of $10,000 advanced for taxes."

A decree was entered in accordance with the findings and recommendations of the master.

Defendant contends that the master and the trial court erred in not holding that a fiduciary relationship existed between defendant and Harold A. Howard at the time of the execution and delivery of the first mortgage trust deed and principal notes and interest coupons thereby secured; that the commission of $300 demanded by said Howard at the time of the making of said loan constituted a profit to which he was not entitled as a matter of law and that defendant is entitled to a credit for that amount; that defendant is also entitled to a credit for all interest now paid on account of said first mortgage and that "said plaintiff is entitled solely to repayment of money actually advanced by him."

The facts were stipulated.

To quote from the able and exhaustive report filed by the master:

"28. That it appears from the evidence that the plaintiff, Harold A. Howard, is now about the age of sixty-eight years, and that the defendant * * * is now about the age of seventy-one years; that * * * [Harold A. Howard] has personally known and has been acquainted with defendant for approximately fifty years.

"30. That for a period of more than fifteen years next preceding the filing of the complaint in this cause, and for several years prior to May 30, 1931, defendant * * * was engaged in whole or in part of the two single title to certain improved real estate

located in the City of Chicago, County of Cook and State of Illinois, in St. Augustine, Florida, Greenwich, Connecticut, and Middleton, Vermont.

"30. That during the aforesaid period of time defendant * * * was, has since continued to be, and is now the owner in fee simple of the legal title to those certain premises * * * commonly known as 310-312 South State Street, in the City of Chicago * * *.

"31. That sometime about the year 1921, defendant * * * together with her sister, Helen Snow Jones, and her brother, Edgcomb Lee Jones, who had likewise known * * * Harold A. Howard, for the greater part of their lives, were jointly interested as the owners of certain improved real estate located in the City of Chicago, having acquired the same either upon the death of their father, Judson Moses Warren Jones, or the aunt of said parties, one Helen Snow; that said improved real estate so owned by the aforementioned persons, in addition to the property involved herein and owned by defendant, * * * consisted of the Rialto Theatre, located at 336 South State Street, in the City of Chicago, Illinois, and a certain parcel of improved real estate located at 516 Sherman Street * * *.

"32. That at or about * * * May 1, 1921, defendant * * * and her brother and sister * * * consulted with Harold A. Howard with respect to that certain piece of improved real estate owned by them and located at 516 Sherman Street, * * * with a view of changing the method of management thereof in order to effect an enhancement in the income then being received by them therefrom; that on May 10, 1921, Helen Snow Jones and her brother, Edgcomb Lee Jones, telegraphed Harold A. Howard as follows: 'Kit has accepted offer to Burley and to us. You can take over management immediately. H. S. Jones and E. L. Jones.'

"33. That on May 11, 1921, [defendant] sold, transferred and conveyed all of her right, title and interest in and to the said real

estate and premises located at 516 Sherman Street * * * to Helen Snow Jones and Edgcomb Lee Jones * * * for a consideration of $40,000, which said deed was placed of record * * *; that all details in connection with the aforesaid sale of the interest of defendant * * * in and to the aforesaid parcel of real estate was handled for and on her behalf by one Clarence Burley; that defendant * * * from that date forward had no further interest in and to said premises, although * * * Harold A. Howard continued to manage the same thereafter for her brother and sister.

"34. That * * * about the latter part of * * * 1922 Harold A. Howard conducted negotiations for and on behalf of defendant * * * and * * * Edgcomb Lee Jones and Helen Snow Jones in connection with a proposition from one S. Seward Lelewer and Henry Posner for a long term lease on the premises involved in this cause and more particularly known and described as 310-312 South State street * * *; that the south twenty-three feet of said premises, being the subject matter of this suit, was and is now owned by defendant * * *; that the north twenty-three feet of said premises, not being involved in this cause, was and is now owned and held by Edgcomb Lee Jones and Helen Snow Jones * * *.

"35. That upon completing the negotiations in connection with the execution of the aforesaid lease on the premises at 310-312 South State Street * * *, being the premises involved herein, Harold A. Howard agreed for and on behalf of defendant, * * * that said lease should be drawn by the * * * attorneys for the lessees, and upon the lease being drafted, Harold A. Howard did take the same to the City of New York where he met the said lessors, defendant * * * and her brother and sister, * * * discussed the terms and provisions of said lease and counseled with them with respect thereto as to the advisability of entering into the same, and caused said lease to be

* * *

"24. That * * * about the latter part of 1928 Howard A. Howard conducted negotiations for and on behalf of defendant * * * and * * * Edgecomb Lee Jones and Helen Rowe Jones in connection with a proposition from one B. Conrad Hofsaker and Henry Lowmar for a long term lease on the premises involved in this cause and more particularly known and described as 310-312 South Olive street * * *; that the south twenty-three feet of said premises, being the subject matter of this suit, was and is now owned by defendant * * *; that the north seventy-three feet of said premises, not being involved in this cause, was and is now owned and held by Edgecomb Lee Jones and Helen Rowe Jones * * *.

"25. That upon completing the negotiations in connection with the execution of the aforesaid lease on the premises at 310-312 South Olive Street * * *, being the premises involved herein, Howard A. Howard acted for and on behalf of defendant, * * * that said lease should be drawn by the * * * attorneys for the lessee, and upon the lease being drafted, Harold A. Howard sent same to the City of New York where he met the said lessors, defendants * * * and her husband and mother, * * * discussed the terms and provisions of said lease and conferred with them with respect thereto as to the desirability of entering into the same, and caused said lease to be

signed by them; that so far as * * * Harold A. Howard knows, defendant * * * had no independent or outside advice in regard to the signing of the same.

"36. That the aforesaid lease was a long term lease whereby the lessee was required to care for the building, pay the taxes and pay the ground rent according to the terms thereof; that all rents due under the terms of said ninety-nine year lease were paid to * * * Harold A. Howard.

"37. That as a result of the aforesaid negotiations culminating in the execution of the ninety-nine year lease * * *, Harold A. Howard thereupon took over and succeeded to the management of said premises on behalf of the defendant, * * * Edgcomb Lee Jones, and * * * Helen Snow Jones * * *, and sometime in the month of April, 1928, likewise took over and succeeded to the management in their behalf of a certain other property located in the City of Chicago * * *, of which they were also the owners in fee simple, said property being the premises more commonly referred to as the Rialto Theatre property located at 336 South State Street * * *; that said Theatre property was, at the time it was taken over, under a long term lease and is still subject to the terms and provisions of the same lease.

"38. That Harold A. Howard never at any time charged defendant * * * any commissions for collecting the rentals on the property located at 310-312 South State Street. The money was collected, placed in the bank and immediately checked out into the accounts of defendant, her brother and sister, in their respective shares. Harold A. Howard did, however, charge a commission for the collection of the rents on the Rialto Theatre property. He collected the rents from both properties up to and including February 18, 1933.

"39. That difficulties arose with reference to the collection of rent and the payment of taxes on the property involved in this

of rent and the payment of taxes on the property involved in this
[illegible] with reference to the collection
[illegible] up to and including February 12, 1938.

"38. That Harold A. Howard never at any time charged defendan
* * * any commissions for collecting the rentals on the property lo-
cated at 310-312 South State Street. The money was collected, place
in the bank and immediately checked out into the accounts of defendan
her brother and sister, in their respective shares. Harold A. Howard
did, however, charge a commission for the collection of the rents on
the Minto Theatre property. He collected the rents from such proper-
ties up to and including February 12, 1938.

"39. That differences exist with reference to the collection
due under the terms of said ninety-nine year leases were paid to * * *
Harold A. Howard.

"37. That as a result of the aforesaid negotiations cul-
minating in the execution of the ninety-nine year leases * * *, Harold
A. Howard thereupon took over and succeeded to the management of said
premises on behalf of the defendant, * * * Malcomb Lee Jones, and
* * * Helen Snow Jones * * *, and sometime in the month of April,
1938, likewise took over and succeeded to the management in their
behalf of a certain other property located in the City of Chicago
* * *, of which they were also the owners in fee simple, said property
being the premises more commonly referred to as the Minto Theatre
property located at 336 South State Street * * *; that said Theatre
property was, at the time it was taken over, under a long term lease
and is still subject to the terms and provisions of the same lease.

"38. That Harold A. Howard never at any time charged defendan
* * * any commissions for collecting the rentals on the property lo-
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premises on behalf of the defendant, * * * Malcomb Lee Jones, and
* * * Helen Snow Jones * * *, and sometime in the month of April,
1938, likewise took over and succeeded to the management in their
behalf of a certain other property located in the City of Chicago
* * *, of which they were also the owners in fee simple, said property
being the premises more commonly referred to as the Minto Theatre
property located at 336 South State Street * * *; that said Theatre
property was, at the time it was taken over, under a long term lease
and is still subject to the terms and provisions of the same lease.

litigation about the year 1930, and Harold A. Howard negotiated with the tenant in respect to said matters for and on behalf of defendant and her brother and sister. The negotiations resulted in the payment by defendant of $5,000 upon the taxes for the year 1930, which was deducted from her share of the rentals after full correspondence with her and with her consent.

"40. That in addition to the services rendered with respect to the two pieces of property * * *, Harold A. Howard has assisted defendant * * *, from time to time, in respect to the taxes, insurance and other matters arising in regard to the properties owned by her and located outside of the State of Illinois, said properties consisting of a large estate located in Greenwich, Connecticut, certain residential property located in the City of St. Augustine, Florida, and certain premises located in Middleton, Vermont.

"41. That Harold A. Howard has carried on correspondence with the defendant * * * since the year 1922; that his correspondence * * * has averaged two letters per month through the years from 1922 to 1933; that in such letters defendant * * * addressed * * * [Harold A. Howard] as 'Harry' and he addressed her as 'Kit'; that, in addition to the business relations existing between them, both of said parties were on the friendliest of terms with each other.

"42. That defendant * * * is now about the age of seventy-one years and is married to William Jennings Ormonde, a man about thirty years her junior; that the said * * * Ormonde has been in ill health a large part of the time and at times is extremely nervous and difficult to handle.

"43. That * * * Harold A. Howard is skilled and experienced in business affairs and that defendant * * * has had no business training and is unskilled and inexperienced in business affairs.

"44. That during the period of time that the aforesaid

relations existed between * * * Harold A. Howard and defendant * * * [Harold A. Howard] was carrying three checking accounts in The First National Bank of Chicago; that one account was entitled 'Harold A. Howard Income Account;' that another account was entitled 'Harold A. Howard Special Account,' and the third was entitled 'Harold A. Howard Agent.'

"45. That all moneys collected for and on behalf of defendant * * * were usually deposited by the said plaintiff in the account 'Harold A. Howard Agent.'

"46. That from time to time certain moneys were deducted by * * * Harold A. Howard, by way of reimbursement to himself for advancements made for and on behalf of the defendant * * *; that said advancements included premiums on insurance, moneys advanced on account of general real estate taxes for property located in Florida, Connecticut and Vermont, moneys advanced to the Collector of Internal Revenue on payment of defendant's Federal Income Tax, and certain other miscellaneous advances and expenditures made by * * * [Harold A. Howard] for the use and benefit of defendant; that neither the general real estate taxes paid in the year 1930 on account of the properties located in Florida, Connecticut and Vermont, nor the moneys advanced in the year 1930 to the Collector of Internal Revenue in payment of defendant's Federal Income Tax, nor the expense of Miss Shine's trip to Europe, were deducted by * * *[Harold A. Howard] in the manner aforesaid, but are now claimed by him as a part of the indebtedness due under the terms and provisions of the Third Mortgage herein sought to be foreclosed.

"47. That the moneys collected by * * * Harold A. Howard, for and on behalf of defendant * * * were deposited in The Northern Trust Company, located in Chicago, Illinois, in an account entitled

relations existed between * * * Harold A. Howard and defendant;

* * * [Harold A. Howard] was carrying three checking accounts

in The First National Bank of Chicago; that one account was entitled

'Harold A. Howard Income Account;' that another account was entitled

'Harold A. Howard Special Account,' and the third was entitled

'Harold A. Howard Agent.'

"48. That all moneys collected for and on behalf of defend-

ant * * * were normally deposited by the said plaintiff in the account

'Harold A. Howard Agent.'

"49. That from time to time certain moneys were delivered by

* * * Harold A. Howard, by way of reimbursement to himself for ad-

vancements made for and on behalf of the defendant * * *; that said

advancements included premiums on insurance, moneys delivered on

account of general real estate taxes for property located in Florida,

Connecticut and Vermont, moneys advanced to the Collector of Internal

Revenue on payment of defendant's Federal Income Tax, and certain

other miscellaneous advances and expenditures made by * * * [Harold

A. Howard] for the use and benefit of defendant; that neither the

general real estate taxes paid in the year 1930 on account of the

properties located in Florida, Connecticut and Vermont, nor the moneys

advanced in the year 1930 to the Collector of Internal Revenue in

payment of defendant's Federal Income Tax, nor the expenses of Miss

Chime's trip to Europe, were deducted by * * *[Harold A. Howard] in

the manner aforesaid, but were now claimed by him as a part of the

indebtedness due under the terms and provisions of the Third Mortgage

herein sought to be foreclosed.

"47. That the moneys collected by * * * Harold A. Howard,

for and on behalf of defendant * * * were deposited in The Northern

Trust Company, located in Chicago, Illinois, in an account entitled

'Katherine J. Ormonde', the same party as Mary Katherine Jones Ormonde, and whenever the payment of sums of money and like charges and deductions were made, as hereinbefore described, the balance remaining from time to time was then deposited in said account and notice of such deposit was thereupon mailed by * * * Harold A. Howard to defendant, together with a statement as to the deductions which had been made.

"48. That on February 18, 1933, the defendant * * * discharged and relieved Harold A. Howard of and from any and all matters and things which he was handling in her behalf, and retained Leo L. Hogan, * * * her now duly authorized attorney-in-fact, in his place and stead.

"49. That on April 27, 1927, defendant wrote to * * * Harold A. Howard and asked him to arrange a mortgage of $25,000 for her for a long term at a nice low rate at once, and instructed him to place it on 310 South State Street, the property involved herein. He advised her by wire that he could obtain a loan immediately at 5-1/2% interest and 2-1/2% commission, or 6% without commission, for ten years. Defendant * * * replied by wire, as follows: 'Twelve years at 5-1/2% will be satisfactory as soon as possible.'

"50. That Harold A. Howard thereupon caused the Chicago Title and Trust Company to prepare the notes and Trust Deed for a twelve year loan at 5-1/2% interest, and forwarded them to defendant for her signature. When the Trust Deed and notes were returned to him he deposited to her credit in The Northern Trust Company $24,225, representing the proceeds of the loan, less a commission of 2-1/2%, the cost of the mortgage policy and expenses of $25 for drawing the papers, recording deeds, etc. That Harold A. Howard made this loan personally and seven or eight months thereafter sold it to his wife, Alice Byram Howard.

'Kitchkins & Ormonde', the name partly on Mary Tatlocking Deeds
Ormonde, and whatever the payment of some of money and like charges
and deductions were made, as hereinbefore described, the balance re-
maining from time to time was then deposited in said account and
notice of each deposit was thereupon mailed by * * * Ormonde *
Howard to defendant, together with a statement in re the deductions
which had been made.

"49. That on February 15, 1922, the defendant * * * Ha-
changed and relieved Harold A. Howard of and from any and all matters
and things which he was handling in her behalf, and retained Leo M.
Hogan, * * * her now duly authorized attorney-in-fact, in his place
and stead.

"50. That on April 27, 1922, defendant wrote to * * *
Harold A. Howard and asked him to arrange a mortgage of $25,000
for her for a long term at a nice low rate at once, and instructed
him to place it on 310 South State Street, the property involved
herein. He advised her by wire that he could obtain a loan immediate-
at 5-1/2% interest and 2-1/2% commission, or 6% without commission, f-
ten years. Defendant * * * replied by wire, as follows: 'Prefer
years at 5-1/2% will be satisfactory as soon as possible.'

"51. That Harold A. Howard thereupon caused the Chicago
Title and Trust Company to prepare the notes and Trust Deed for
a twelve year loan at 5-1/2% interest, and forwarded them to defend-
ant for her signature. Upon the Trust Deed and notes were endorsed
to him he deposited to her credit in The Northern Trust Company
$24,225, representing the proceeds of the loan, less a commission
of 2-1/2%, the cost of the mortgage policy and expenses of $15 for
drawing the papers, recording deeds, etc. That Harold A. Howard
made this loan personally and never on eight months thereafter paid
it to his wife, Alice Byram Howard.

"51. That at the time this loan was made Harold A. Howard was collecting the rents on the State Street property and was depositing her share to the credit of defendant without commission, and was collecting the rents from the Rialto Theatre and depositing her share to her credit, after charging a commission.

"52. It is debatable whether a fiduciary relationship existed between Harold A. Howard and defendant at that time, but, assuming for the sake of the argument that a fiduciary relationship did exist, and that, therefore, the burden of proof is upon Harold A. Howard to show an absence of undue influence and that the transaction was had in the most perfect good faith and was equitable and just between the parties, I am of the opinion that the transaction should be held valid. The trust deed and notes were executed by defendant with full knowledge of their nature and effect and because of the voluntary and intelligent desire of defendant. There is no proof that Harold A. Howard exerted any influence over defendant in this transaction; she received full and adequate consideration for the mortgage. The commission, when spread over the twelve years that this mortgage runs, did not raise the interest on this mortgage so that it was usurious."

The trial court found "that the transaction [the first mortgage trust deed] was had in the most perfect good faith and was equitable and just between the parties. The Trust Deed and notes were executed by the defendant, with full knowledge of their nature and effect and because of the voluntary and intelligent desire of the defendant. There is no proof that Harold A. Howard exerted any influence over the defendant in this transaction; she received full and adequate consideration for the mortgage. The commission, when spread over the twelve years that this mortgage runs, did not raise the interest on this mortgage so that it was usurious." We agree with the conclusion of the master and the trial court as to the first

mortgage trust deed. The instant contention of the defendant is without merit.

Defendant contends that she is entitled to an accounting and that the trial court erred in refusing to decree that Harold A. Howard, or his personal representative, should account to her for his disbursements of her money. The master found that "the defendant, Mary Katherine Jones Ormonde, was apprised at all times by letters and by statements of the collections made for her by the plaintiff, Harold A. Howard, and of the advances made for her benefit and is not entitled to an accounting." The trial court sustained this finding and the recommendation of the master. The answer and counterclaim of defendant are verified by her real estate agent, and the only allegations in these pleadings that there were errors or misrepresentations in the accounts rendered to defendant are made on information and belief. Neither defendant nor Howard testified in the cause. Howard was ill during the trial of the cause and died before the decree was entered. The stipulation of facts shows that defendant has had a full accounting from time to time as rents were collected and charges and deductions were made. From time to time the balance remaining to her credit was deposited in her account and a notice of the deposit was mailed to her, together with a statement as to deductions which had been made. The voluminous correspondence between the parties shows that Harold A. Howard was fully and fairly apprising defendant of the state of the account between them. An examination of her letters to Howard shows that she made no objection to any of the statements. Defendant did not introduce any evidence to dispute or question the accuracy and honesty of the statements that had been rendered to her by Howard. Miss Shine had been the secretary of Harold A. Howard for many years, was still in his employ at the time of the trial, and she was familiar with his business

affairs. If defendant seriously questioned the statements that had been rendered to her she had full opportunity to examine Miss Shine and Howard's books of account. She did not see fit to do so. There is much force in the argument of plaintiff that the instant contention of defendant that she is entitled to an accounting is raised for the purpose of delaying the execution of the decree. As we read the record defendant's counsel has obtained for her every credit to which she is entitled.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

effairs. If defendant seriously questioned the statements that had been rendered to her she had full opportunity to examine Miss Chinn and Howard's books of account. She did not see fit to do so. There is much force in the argument of plaintiff that the instant contention of defendant that she is entitled to an accounting is raised for the purpose of delaying the execution of the decree. As we read the record defendant's counsel has obtained for her every credit to which she is entitled.

The decree of the District court of Cook county is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

39399

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Successor Trustee under Trust Indenture filed for record in the office of the Recorder of Deeds of Cook County, Illinois, as Document No. 8230113,

Appellant,

v.

ROSE WAINAUSKAS, also known as ROSDIJCI WAINAUSKAS,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

294 I.A. 604

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

City National Bank and Trust Company of Chicago, as successor trustee under a trust deed in the nature of a mortgage, brought an action of forcible detainer against Rose Wainauskas, defendant, to recover possession of an apartment in the building located upon the premises conveyed by the trust deed. The case was submitted to the court upon an agreed statement of facts, the issues were found in favor of defendant, and plaintiff appeals from a judgment entered upon the finding.

On December 15, 1923, Robert Bundo et al., being indebted in the sum of $125,000, executed bonds in that amount, and to secure their payment conveyed by trust deed of even date certain premises to the Chicago Trust Company, as trustee. The premises were improved by an apartment building containing twenty-seven apartments, one of which is occupied by defendant. After several mesne conveyances defendant, about August 1, 1930, acquired title to the premises, subject to the lien of the said trust deed, and is the owner of the equity of redemption. On June 15, 1931, there was a default in pay-

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CITY NATIONAL BANK AND TRUST COMPANY
OF CHICAGO, as successor in the Master
Trust Indenture filed for record in
the office of the Recorder of Deeds
of Cook County, Illinois, as Document
No. 0021113,

Appellant,

v.

ROSE KIRKPATRICK, also known as
MRS. WILLIAM KIRKPATRICK,

Appellee.

Appeal from the Circuit Court of Cook County.

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

City National Bank and Trust Company of Chicago, as successor trustee under a trust dead in the nature of a mortgage, brought an action of foreclosure against Rose Kirkpatrick, defendant, to recover possession of an apartment in the building located upon premises conveyed by the trust deed. The case was submitted to the court upon an agreed statement of facts, the issues were found in favor of defendant, and plaintiff appeals from a judgment entered upon the finding.

On December 12, 1922, Robert Hardy et al., being interested in the sum of $125,000, executed their note in that amount, and to secure their payment conveyed by trust deed of even date certain premises to the Chicago Trust Company, as trustee. The premises were improved by an apartment building containing thirty-seven apartments, one of which is occupied by defendant. After default under certain covenants, August 1, 1931, employed this as the premises of the trust agreement, and it the owner of the equity of redemption. On June 13, 1933, there was a default in payment of principal and interest, and plaintiff elected to declare the whole indebtedness due. Thereupon it filed its complaint to foreclose the trust deed, and made defendant a party defendant, as the occupant of the premises. Defendant filed her answer, setting up as a defense that she was a tenant of the premises under a written lease executed by the trustee, and that the trustee had agreed to renew the lease for a further term of five years. Plaintiff moved to strike out the answer, and the motion was sustained. Defendant elected to stand by her answer, and the court entered a decree of foreclosure and sale. Plaintiff appeals.

294 I.A. 601

ment of principal due on bonds, and on August 7, 1931, the trustee filed a bill to foreclose the trust deed. At the time the instant action was commenced the default in principal totaled $83,000. The default has existed since June 15, 1931, and the interest due on said sum has also been in default since the same date. Upon default, the trustee, pursuant to certain provisions of the trust deed, took possession of the entire premises save the apartment occupied by defendant, and has collected rents for all of the apartments save the one occupied by defendant. Plaintiff was appointed, on March 4, 1935, successor trustee under the trust deed, with all of the rights, powers, etc., of the original trustee, and is now in possession, as successor trustee, of the entire premises save the apartment occupied by defendant. Prior to the commencement of the instant suit plaintiff served a written demand for possession upon defendant. Defendant never attorned to plaintiff nor to the original trustee. She has occupied the apartment in question, without paying rent, since the date of the default, June 15, 1931. The foreclosure proceeding is still pending.

Plaintiff contends that upon default in the covenants of the trust deed it was entitled as trustee thereunder to possession of the premises conveyed by the trust deed, and that its right to such possession may be enforced as against defendant, the owner of the equity of redemption, by way of a forcible detainer action, after a written demand for possession had been made upon defendant, and that the trial court erred in refusing to enter judgment in favor of plaintiff and in entering judgment in favor of defendant.

The major contention of defendant in support of the judgment is that the instant action will not lie because plaintiff had not previously been in possession of the apartment occupied by her. In support of the contention defendant relies upon Cody Trust Co. v.

ment of principal due on bonds, and on August 1, 1931, the trustee filed a bill to foreclose the trust deed. At the time the instant action was commenced the default in principal totaled $83,000. The default has existed since June 15, 1931, and the interest due on said note has also been in default since the date of its. Upon default, the trustee, pursuant to certain provisions of the trust deed, took possession of the entire premises save the apartments occupied by defendant, and has collected rents for all of the apartments save the one occupied by defendant. Plaintiff was appointed, on March 4, 1932, successor trustee under the trust deed, with all of the rights, powers, etc., of the original trustee, and is now in possession, as successor trustee, of the entire premises save the apartment occupied by defendant. Prior to the commencement of the instant suit plaintiff served a written demand for possession upon defendant. Defendant never attorned to plaintiff nor to the original trustee. She has occupied the apartment in question, without paying rent, since the date of the default, June 15, 1931. The foreclosure proceeding is still pending.

Plaintiff contends that upon default in the covenants of the trust deed it was entitled as trustee thereunder to possession of the premises conveyed by the trust deed, and that its right to such possession may be enforced by joining defendant, the owner of the equity of redemption, by way of a forcible detainer action, after a written demand for possession had been made upon defendant, and that the trial court erred in resolving to enter judgment in favor of plaintiff and in entering judgment in favor of defendant.

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Dittmar, 272 Ill. App. 167. In West Side Trust & Savings Bank v. Gerstein, 270 Ill. App. 250, the First Division of this court held that where a trust deed conveys the rents as security for the indebtedness, the trustee may upon condition broken take possession of the premises, collect the rent therefrom, and apply it on the indebtedness; that upon condition broken a trustee under a trust deed mortgage which pledges the rents and profits as security for the indebtedness may, under clause 2 and clause 4 of section 2 of the Forcible Entry and Detainer Act, maintain an action of forcible detainer against a tenant of the premises conveyed who refuses to pay rent to the trustee or to vacate after being properly notified by the trustee. In West Side Trust & Savings Bank v. Bronston, 270 Ill. App. 630 (abstract opinion), we agreed with the ruling in the Gerstein case. In Cody Trust Co. v. Dittmar, supra, the Third Division disagreed with the ruling in the Gerstein case and expressed the opinion that clauses 2 and 4 of section 2 of the Forcible Entry and Detainer Act "clearly are provisions for the repossession of property where the plaintiff at one time had possession and possession was unlawfully withheld," and that, therefore, "a mortgagee or a trustee in a trust deed on default or condition broken is not entitled to the benefit of the Forcible Entry and Detainer Act in seeking to obtain possession of the real estate covered by the mortgage or trust deed." In Personal Home Mtg. Co. v. Seegrin, 275 Ill. App. 419, the First Division of this court stated that it was unable to agree with the conclusion of the Third Division in the Cody case, and after an exhaustive review of the law bearing upon the question, held that "only in cases brought under clause 1 of section 2 of the act is actual prior possession by the plaintiff indispensable." In West Side Trust & Savings Bank v. Lopoten, 273 Ill. App. 629 (abstract opinion), the Third Division followed its ruling in the Cody case. A writ of certiorari was

granted in that case (West Side Trust and Savings Bank v. Lopoten, 358 Ill. 631) and in its opinion the Supreme court states (pp. 637-639): "The second section of the act makes provision for actions not only in forcible entry and detainer but also in forcible detainer. A recognized distinction obtains between them. The former is an action for re-possession by a party who has been disseized, and in such case it is necessary for the plaintiff to charge and prove that he was in possession of the premises and that his possession was invaded by the defendant. (Thompson v. Sornberger, 59 Ill. 326; Dudley v. Lee, 39 id. 339.) However, in an action of forcible detainer it is not essential for the plaintiff to have had possession nor for the defendant to have received possession from him. (Cairo and St. Louis Railroad Co. v. Wiggins Ferry Co., 82 Ill. 230; Allen v. Webster, 56 id. 393.) Forcible entry and detainer actions are brought under the first clause of section 2, and an invasion of the plaintiff's actual possession of the premises described in the complaint, at the time of the alleged entry, is a prerequisite to the maintenance of the proceeding. The right of action must be exercised in his name. It will not pass to his assignees or representatives. (Fitzgerald v. Quinn, 165 Ill. 354; Thompson v. Sornberger, 59 id. 326; McCartney v. McMullen, 38 id. 237.) Actual prior possession has been held not indispensable as a basis for actions of forcible detainer under the succeeding clauses of this section. A right of action exists under the second clause of section 2 where peaceable entry is made upon premises in the actual possession of either the plaintiff or of those to whose rights he has succeeded and the possession is unlawfully withheld after demand. It is not required, however, that the relation of landlord or tenant, or any other particular contractual relation, should exist to authorize restoration of the party entitled to possession. (Thomasson v. Wilson, 146 Ill. 384.) The grantee of the landlord may maintain the action. (Thomas-

granted in that case (West Side Trust and Savings Bank v. Hopkins, 330 Ill. 631) and in its opinion the Supreme Court stated (pp. 637-638): "The second section of the act makes provision for actions not only in forcible entry and detainer but also in forcible detainer. A recognized distinction obtains between them. The former is an action for re-possession by a party who had been dispossessed, and in such case it is necessary for the plaintiff to charge and prove that he was in possession of the premises and that his possession was invaded by the defendant. (Thompson v. Schweitzer, 91 Ill. 250; Findlay v. Loe, 93 Id. 259.) However, in an action of forcible detainer it is not essential for the plaintiff to have had possession nor for the defendant to have received possession from him. (Price and Ux. Terre Haute & Indianapolis R. R. Co. v. Clarke, 89 Ill. 350; Ryan v. Graham, 96 Id. 383.) Forcible entry and detainer actions are brought under the first clause of section 1, and on invasion of the plaintiff's actual possession of the premises described in the complaint, at the time of the alleged entry, is a prerequisite to the maintenance of the proceeding. The right of action must be asserted in his name. It will not pass to his successors or representatives. (Pittsfield v. Young, 108 Ill. 304; Thompson v. Schweitzer, 91 Id. 250; Robertson v. Phillips, 98 Id. 257.) Actual peaceable possession has been held not indispensable as a basis for actions of forcible detainer under the succeeding clauses of that section. A tenant or sublessee entered under the second clause of section 2 whose possession entry is made upon premises in the actual possession of either the plaintiff or of those to whose rights he has succeeded and the possession is unlawfully withheld after demand. It is not required, however, that the relation of landlord or tenant, or any other particular contractual relation, should exist to authorize maintenance of the party entitled to possession. (Thompson v. Glenn, 154 Ill. 267.) The grantee of the landlord may maintain the action. (Thomp-

son v. Wilson, supra; Allen v. Webster, 56 Ill. 393; Fisher v. Smith, 48 id. 184; Dudley v. Lee, 39 id. 339.) Again, where premises have been leased to a prospective tenant who is unable to obtain possession by reason of a former tenant holding over after his term expired, the right to maintain the action vests in the lessee, alone. (Gazzolo v. Chambers, 73 Ill. 75.) The devisee or grantee of a lessor, by the express provisions of section 14 of the Landlord and Tenant act, may maintain an action of forcible detainer in his own name. The right of the respective plaintiffs in the illustrative cases cited presumably vested in those who had never been in the actual possession of the premises. The manifest legislative intent disclosed by section 2 is that only in cases brought under the first clause is the action primarily one for re-possession, and that the remedy afforded by the remaining clauses is not restricted to those who were originally in possession of the land but also extends to the persons presently entitled to the possession after a demand in writing." This decision determines the contention of defendant, and adversely to her. "Upon default he [the trustee] has the right to possession against the mortgagor, his grantee, or anyone claiming under him by any right." (Wolkenstein v. Slonim, 355 Ill. 306, 309. See, also, West Side Trust and Savings Bank v. Lopoten, supra.)

Defendant also urges that plaintiff has an adequate remedy against the defendant in the pending foreclosure proceedings or by ejectment, and that it seems unfair and unequitable to permit plaintiff "to try its cause in a court of equity and a forcible detainer action at the same time." It is a sufficient answer to this contention to say that separate remedies may be pursued simultaneously.

The judgment of the Municipal court of Chicago is reversed, and the cause is remanded with directions to the trial court to

enter judg t for plaintiff for possession of the premises described he statement of claim.

JUDGMENT REVERSED, AND CAUSE REMANDED WITH DIRECTIONS TO TRIAL COURT TO ENTER JUDGMENT FOR PLAINTIFF FOR POSSESSION OF PREMISES DESCRIBED IN STATEMENT OF CLAIM.

Friend, P. J., and Sullivan, J., concur.

39551

LENA RODEGHIER,
Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

294 I.A. 605

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is a suit on a policy of insurance issued by defendant on the life of Albert Rodeghier in the sum of $1,000, in which policy plaintiff is named as beneficiary. A jury returned a verdict in favor of plaintiff and against defendant in the sum of $974.98 and defendant appeals from a judgment entered upon the verdict.

The complaint alleges, inter alia, the issuance of the policy on December 15, 1932, and the death of Albert Rodeghier on March 15, 1935. It also alleges that the premiums were paid, that until the time of his death, Albert Rodeghier kept and performed all conditions, obligations and requirements of said policy, and that plaintiff has kept and performed all things by her to be done under the terms of the policy. The answer of defendant admits the issuance of the policy, and avers that the policy requires an annual premium payment of $15.56 on December 16 of each year and that such premium payments are necessary to keep the policy in force. It admits that Albert Rodeghier died on March 15, 1935, denies that the policy was in force on that date, and avers that the policy lapsed for the nonpayment of the annual premium due December 16, 1934; that on account of said nonpayment the policy lapsed and was not in force on the date of the death of Albert Rodeghier. Plaintiff filed a replication denying the lapse of the policy and alleging that it was still in force at the time of the death of Albert Rodeghier, because he had made application for a loan which was

30931

LENA ROSE LER,
Appellee,

vs.

GEORGE, a corporation,
Appellant.

No. 2941A. 505

Appeal from Lincoln County
Defendant convicted.

accepted by defendant with the assurance that said application was sufficient performance of the undertakings of the insured to maintain the policy in force and effect during the pendency of such loan application and for a reasonable time thereafter. Defendant filed a rejoinder to the replication.

Defendant contends that "the verdict and judgment are contrary to the manifest weight of the evidence," and it asks us "to reverse the judgment and remand the cause for a new trial." After a careful examination of the evidence we are satisfied that this contention is a meritorious one. As the case may be tried again, we refrain from analyzing the evidence and commenting upon it.

Defendant raises and argues other contentions but we do not deem it necessary to pass upon the same.

The judgment of the Circuit court of Cook county is reversed, and the cause is remanded for a new trial.

JUDGMENT REVERSED, AND CAUSE REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

39817

MILTON M. MAREMONT,
Appellee,

v.

LAWYERS MUTUAL BENEFIT ASSOCIATION, a corporation,
Appellant.

18A

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

294 I.A. 605

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, as beneficiary under a certificate of membership for $500 issued to his mother, by defendant, a mutual benefit association, sued defendant after the death of the insured. Defendant filed an amended affidavit of defense which avers that deceased, Anna M. Rogers, died of heart disease, "and more particularly described as Toxic Myocarditis and Coronary Embolism," and that under the terms of the policy plaintiff, the beneficiary, was entitled to $100 and no more; that the tender of the $100 was made before the institution of the suit, and is hereby again tendered in this action in full liquidation of defendant's obligation to plaintiff. Plaintiff thereupon moved for a partial judgment for $100, which was entered and satisfied. A jury rendered a verdict finding the issues against defendant and assessing plaintiff's damages in the sum of $400. Defendant appeals from a judgment entered upon the verdict.

The certificate of membership contains the following clause: "DISEASES: Should the member die within twelve months from the date of this certificate from heart disease, liver or kidney trouble, Bright's disease, diabetes, cancer, arterio-schlerosis, cerebral hemorrhage, pernicious anaemia, tuberculosis or any chronic disease,

the Association will pay one-fifth of the amount which would otherwise be payable under the terms of this certificate." (Italics ours.)

Defendant contends that "the verdict of the jury and judgment entered thereon are against the manifest weight of the evidence because the member died of heart disease," less than four months after the date of the certificate, and the payment of $100 discharged the liability of defendant. The contention is without merit, and we feel impelled to state that, in our opinion, the defendant was not justified in contesting plaintiff's claim. But two witnesses testified in the cause, plaintiff and Dr. Julian L. Plaut. Plaintiff, the son of the insured, testified that his mother lived at 5308 Hyde Park boulevard; that he lived less than half a block from her home and that he saw her almost every day; that in October 1935, she applied for the insurance in question; that his mother had a seven-room apartment and took care of it with the help of a maid. Plaintiff attempted to show that his mother was in apparent good health, for a person of her age, for a period of something like six months prior to the latter part of January, 1936. The trial court sustained an objection of defendant to this testimony. The offered testimony was competent. The witness was permitted to testify that from October 25, 1935, until Dr. Plaut was called to see his mother, about the middle of January, 1936, she had no medical attention. The witness further testified that on New Year's Eve, 1936, he and his wife took his mother to the midnight show at the Palace theater and from there they went to Ireland's restaurant and had something to eat; that while there his mother complained that she had caught a cold; she commenced to sneeze, had chills, and he immediately took her home, where she was confined until her death; that he called Dr. Plaut about January 20. Defendant stipulated that Dr. Plaut was an expert in his profession. The doctor testified that he was called

otherwise be payable under the terms of this certificate."
(Italics ours.)

Defendant contends that "the verdict of the jury and judgment entered thereon are against the manifest weight of the evidence because the member died of heart disease," less than four months after the date of the certificate, and the payment of such disease changed the liability of defendant. The contention is without merit, and we feel impelled to state that, in our opinion, the defendant was not justified in contesting plaintiff's claim. But two witnesses testified in the case, plaintiff and Dr. Julian L. Plant. Plaintiff, the son of the insured, testified that his mother lived at 8308 Hyde Park Boulevard; that he lived less than half a block from her home and that he saw Plant nearly every day; that in October 1935, she applied for the insurance in question; that his mother had a seven-room apartment and took care of it with the help of a maid. Plaintiff attempted to show that his mother was in apparent good health, for a person of her age, for a period of something like six months prior to the latter part of January, 1936. The trial court sustained an objection of defendant to this testimony. The offered testimony was competent. The witness was permitted to testify that from October 25, 1935, until Dr. Plant was called to see his mother, about the middle of January, 1936, she had no medical attention. The witness further testified that on New Year's Eve, 1936, he and his wife took his mother to the apartment show at the Palace theater and from there they went to Lyford's restaurant and had supper; that while there his mother complained that she had caught a cold; she commenced to sneeze, had chills, and he immediately took her home, where she was confined until her death; that he called Dr. Plant about January 26. Plaintiff explained that Dr. Plant was an expert in his profession. The doctor testified that he was called

to see Anna M. Rogers on January 25, 1936; that his first examination showed that "she was very acutely ill, running a rather high temperature, and I couldn't find anything definite other than what we call the upper respiratory function or a bad cold that had gone into the chest. However, the following day there were enough physical findings to warrant a diagnosis of pneumonia;" that he then called upon her constantly until her death, February 4, 1936; that he sometimes called to see her three times a day. The following then occurred in the examination of the witness:

"Q. Will you please tell the Court and the Jury just what you found from day to day on your examination of this patient? Just take it from the 25th, now.

"A. Well, on the 25th as I said she was very acutely ill and on the 26th there were enough physical findings to warrant the diagnosis of bronchial pneumonia, and in which she had what we call rales, dullness and even lessened respiratory sounds, and breathing in the bases. As she went along from day to day the base of both lungs were all consolidated or you might say gelatineous so there was no air admitted and she was suffering tremendously from lack of sufficient oxygen. We put her in an oxygen tent and she rested considerably easier when we left her in there. Her temperature remained quite high and I think for two or three days I did not examine her chest, as long as she was apparently comfortable and apparently was not going down hill. Around the end of January or the first or second of February her temperature began to decrease and on the - - I think it was the 2nd or 3rd of February her temperature was normal. She was taking food very poorly and we had to almost force feed her. On the 3rd, I felt that she was well enough to take more nourishment. We had a little difficulty in getting her to co-operate. Her temperature was normal and her pulse had gone

to see Anne R. Ogara on January 23, 1929; that his first examination showed that "she was very acutely ill, running a rather high temperature, and I couldn't find anything definite other than what we call the upper respiratory functions or a bad cold that had gone into the chest. However, the following day there were enough physical findings to warrant a diagnosis of pneumonia;" that he then called upon her constantly until her death, February 4, 1929; that he sometimes called to see her three times a day. The following then occurred in the examination of the witness:

"Q. Will you please tell the Court and the Jury just what you found from day to day on your examination of this patient? Just take it from the 25th, now.

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down practically to normal. I saw her a little after midnight on the 3rd and assured the family as I was leaving she was going to get well. Within an hour or an hour and a half they called me and told me she had died.

"Q. Will you tell the Court and Jury what is the meaning of coronary embolism?

"A. Coronary embolism is the lodging of a clot or a foreign substance such as fat into one of the arteries which supply the musculature of the heart with blood supplying that portion of the heart which is furnished with that blood or nourished by that vessel.

"Q. Doctor, will you please tell the Court and Jury the meaning of myocarditis, toxic myocarditis?

"A. Toxic myocarditis is the result of poisoning to the heart muscle so that if we would see a heart in that condition the muscles would appear swollen, as we call it, a cloudy swelling, and functionally, or as they act, they would not have the proper strength to contract and force the blood through the body as they had formerly. In other words, it is a weakened muscle that is due to poisoning, and toxin is a poisoning just as in diphtheria there is a toxin that is developed which causes the illness much more than the bacteria or the germs cause the diptheria.

"Q. Now, Doctor, did you find any bronchial pneumonia?

"A. I did. * * *

"Mr. Clark [attorney for plaintiff]: * * * Q. What was the cause, in this particular patient, of this toxic myocarditis?

"Mr. Bennett [attorney for defendant]: If he knows.

"A. According to Cecil's Text Book of Medicine which is one of the accredited Text Books taught to medical students here in the middle west, they state very definitely that an acute myocardia or a toxin is probably always secondary to any acute infection and, as I mentioned before, diphtheria which is one of the best known

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substance such as fat into one of the arteries which supply the muscular

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In other words, it is a weakened muscle that is due to poisoning, and

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"A. I did. * * *

"Mr. Clark [attorney for plaintiff]: * * *. What was

the cause, in this particular patient, of this toxic myocarditis?

"Mr. Dunnett [attorney for defendant]: If he knows.

"A. According to Dacosta's Text Book of Medicine which is

one of the accredited Text Books used to medical students here in

the middle west, they state very definitely that an acute myocarditis

or a toxin in people always secondary to any acute infection such

as I mentioned before, diphtheria which is one of the very known

examples of toxic myocarditis and sudden death. I doubt if there is anyone that will refute the statement that death can be caused through the toxicity of the diphtheretic bacillae.

"Q. Doctor, do you understand that heart disease, so-called, has one meaning with the average person or the layman and a different meaning for the medical profession?

"Mr. Bennett: That is objected to.

"The Court: Sustained.

"Mr. Clark: Q. Will you explain to the Court and Jury just what is meant by heart disease?

"A. Heart disease covers any ailment to which the - - in which the circulation is impaired or irregular. That may be due to infection, it may be due to a congenital or a lesion where the patient is born with the defect, it may be the result of infection such as in rheumatism where frequently the valves are so involved that there is what is known as a leak, and I would say that most people consider heart disease that condition in which there is a leaky valve or a whistling, or a whisper, or a heart leak or a heart murmur. That does not cover all of the diseases of the heart.

"Q. Did you find at any time on your examination of this patient leakage of the heart? A. I did not.

"Mr. Bennett: Oh, that is objected to. He can tell what he did find but what he did not find - -

"The Court: If he examined her for that purpose he may testify.

"A. In examining a patient we usually go over them looking for heart trouble.

"The Court: Did you in this case look for heart trouble?

"A. Yes, I did. I do in every case.

"Mr. Clark: Q. And did you find it? A. I did not.

"Q. Doctor, will you please tell the Court and Jury what

exemplar of toxic microorganism to the human body. I doubt if there is anyone that will refute the statement that death can be caused through the toxicity of the diphtheretic bacillus.

"Q. Doctor, do you understand that heart disease, so-called, has one meaning with the average person of the layman and a different meaning for the medical profession?

"Mr. Bennett: What is objected to.

"The Court: Sustained.

"Mr. Glenn: Q. Will you explain to the Court and Jury just what is meant by heart disease?

"A. Heart disease covers any ailment to which the - - in which the circulation is impaired or irregular. That may be due to infection, it may be due to a congenital or a lesion where the patient is born with the defect, it may be the result of infection somewhere in rheumatism where principally the valves are so involved that what is known as a leak, and I would say that most people diagnose heart disease that condition in which there is a leaky valve as a mitralling, or a whisper, or a heart lack or a heart murmur. That does not cover all of the diseases of the heart.

"Q. Did you find at any time on your examination of Mrs Patient lookup of the Heart? A. I did not.

"Mr. Bennett: Of, that is objected to. He can tell what he did find but what he did not find - -

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"The Court: Did you in this case look for heart trouble?

"A. Yes, I did. I do in every one.

"Mr. Glenn: Q. And did you find it? A. I did not.

if anything is the difference between bronchial pneumonia and toxic myocarditis?

"A. Bronchial pneumonia is an infection of the lungs. Myocarditis is an affection of the heart, the heart is involved in a myocarditis. Pneumonia affects the lungs primarily and from that there may be poisons thrown into the circulation which may affect any organ of the body and the heart may or may not be affected by it. In this particular case I feel that the heart was poisoned by the toxin of the bronchial pneumonia and weakened.

"Q. Now, Doctor, from your attendance on the patient and your examinations and your medical experience do you have an opinion as to the cause of the death of Anna M. Rogers?

"A. The cause of death was bronchial pneumonia which so injured the heart that she died suddenly from an acute collapse or an acute failure of the heart.

"Q. As a matter of fact, Doctor, isn't so-called heart disease a lingering disease?

"Mr. Bennett: That is objected to, if the Court please. It can be lingering or not lingering. That is just the point. If you put the question whether it is a lingering or is not a lingering disease it would be proper for an answer.

"Mr. Clark: Q. Is heart disease a lingering disease?

"A. Heart disease may be a lingering disease and it may not be a lingering disease. The so-called acute deaths from heart disease cannot be found - - well, you could see within a week prior to death. Heart disease as it is commonly spoken of by the layman is a lingering disease."

The cross-examination of the witness was as follows:

"Q. Is all poisoning of the heart heart disease?

"A. What do you mean by poisoning of the heart?

"Q. Inflammation of the myocardium that was caused by

it anything to the difference between chronical rheumatism and acute myocarditis?

"A. Theoretical rheumatism is an inflammation of the tunica, pericarditis is an affection of the heart, the heart is involved in a myocarditis. Rheumatism affects the joints primarily and often that there may be poisons thrown into the circulation which may affect any organ of the body and the heart may or may not be affected by it. In that particularly case I felt that the heart was poisoned by the toxin of the primordial rheumatism was eradicated.

"Q. Now, Doctor, from your attendance on the patient and your examinations and your medical experience do you have an opinion as to the cause of the death of Jones A. Ogera?

"A. The cause of death was rheumatic poisoning which so injured the heart that the chief auricular from an acute collapse or an acute failure of the heart.

"Q. As a matter of fact, Doctor, isn't so-called heart disease a lingering disease?

"Mr. Bennett: That is objected to, if the Court please. You put the question whether it is a lingering or is not a lingering disease it would be proper for an answer.

"Mr. Clark: Q. Is heart disease a lingering disease?

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"Q. In all poisoning of the heart disease?

"A. What do you mean by poisoning of the heart?

"Q. Inflammation of the myocardium that was caused by

poisoning.

"A. Do you have reference to this specific case? Q. Yes.

"A. Yes. That was due to the toxin from the bronchial pneumonia.

"Q. And that was a disease of the heart? A. No.

"Q. Toxic myocarditis is a heart disease.

"A. That is a descriptive term.

"Q. Is it classified by the text book writers as a heart disease? A. Yes.

"Q. And in your death certificate you labeled this lady's death as caused by myocarditis.

"A. Following bronchial pneumonia.

"Q. You also said that she - - that one of the causes of her death was coronary embolism. A. Yes, sir.

"Q. Embolism being a clot of some kind? A. That's right.

"Q. At what location?

"A. In the coronary vessels, the heart vessels, the vessels supplying the heart with blood.

"Q. The heart vessel is the little artery that feeds the heart itself? A. Yes, sir.

"Q. And that foreign substance probably closed the body?

"A. Closed the vessel off so it stopped nourishment.

"Q. And then when the heart would not have this nourishment of course there is only one result, that is death? A. Yes.

"Q. By the way, I show you here a document that is marked Plaintiff's Exhibit One and ask you to tell the Court what that is.

"A. This is a photostatic copy of a death certificate which I signed for Mrs. Anna M. Rogers.

"Q. And supplied by the Board of Health of Chicago?

"A. Yes. I assume so, anyway.

"Q. And the original of this is on file?

poisoning.

"Q. So you have reference to this specific cause? A. Yes.

"A. Yes. That was due to the toxin from the pneumonia.

pneumonia.

"Q. And that was a disease of the heart? A. No.

"Q. Vavle disease is a heart disease.

"A. That is a descriptive term.

"Q. Is it classified by the text book writers of a heart

disease? A. Yes.

"Q. And in your death certificate you labeled this Lady's

death as caused by myocarditis.

"A. Following pneumonia.

"Q. You also said that she - - that one of the causes of

her death was coronary thrombism. A. Yes, sir.

"Q. Thrombism being a clot of some kind? A. That's right.

"Q. At what location?

"A. In the coronary vessels, the heart vessels, the vessels

supplying the heart with blood.

"Q. The heart vessel is the little artery that feeds the

heart itself? A. Yes, sir.

"Q. And that formed subsequent probably closed the body?

"A. Closed the vessel off to it stopped nourishment.

"Q. And then the heart could not have that nourish-

ment of course there is only one result, that is death? A. Yes.

"Q. By the way, I show you here a document that is marked

Plaintiff's Exhibit 1 and ask you to tell the Court what that is.

"A. This is a photostatic copy of a death certificate which

I signed for Mrs. [illegible].

"Q. And supplied by the Board of Health of Delaware?

"A. Yes. I assume so, [illegible].

"Q. And the original of that is on file?

"A. In the Board of Health, that's right.

"Q. And now, * * * just after midnight on the third, I suppose you mean the early morning of the fourth, you left her home?

"A. Yes.

"Q. And that is the time you told the children she was going to get well? A. Yes.

"Q. In other words, she made sufficient response that you had quite a bit of confidence in her pulling through? A. That's right.

"Q. And her death was some two hours later? A. Yes, sir.

"Q. A sudden death? A. Yes, sir.

"Q. Reported to you by the people in the home? A. Yes.

"Q. She died in three or four minutes or so?

"A. Very quickly, yes, sir.

"Q. From your examination and observation you classified her death as caused by coronary embolism and toxic myocarditis following bronchial pneumonia? A. That is correct.

"Q. Now, also coronary embolism by the text book writers in the medical profession is that classified as one of the heart diseases? A. Yes, sir.

"Q. Would you so classify it? A. Yes, sir.

"Q. You would also so classify toxic myocarditis?

"A. That's right. However, if I may add, both of those conditions are extremely acute and there is no means of proving they were there previously.

"Q. Then it is possible for many an apparently healthy person to drop dead of myocarditis? A. Yes, sir.

"Q. It would be a heart disease? A. Yes.

"Q. And I have never been able to treat it in my life?

"A. That's right. So you can't say you have heart trouble

"A. In the event of death, that's right.

"Q. And now, I'm just going through on the theory, you left out I suppose from the early morning of the 12th, you left out some?

"A. Yes.

"Q. And that is the time you say the gentleman who was going to get wolfit. A. Yes.

"Q. In other words, the most sufficient response that you had quite a bit of confidence in may pulling through? A. That's right.

"Q. And that death was some two hours later? A. Yes, sir.

"Q. A sudden death? A. Yes, sir.

"Q. Reported to you by the people in the house? A. Yes.

"Q. She died in three or four minutes or so?

"A. Very quickly, yes, sir.

"Q. From your examination and observation was classified her death as caused by coronary occlusion and acute myocarditis following bronchial pneumonia? A. That is correct.

"Q. Now, also coronary occlusion by the very best medicine in the medical profession is also listed as one of the best diseases? A. Yes, sir.

"Q. Only you is clumsily put? A. Yes, sir.

"Q. You could also so clumsily locate appendicitis?

"A. That's right. Doctors, if I may say, both of those conditions are extremely acute and there is no means of telling they were there previously.

"Q. Then it is possible for such an apparently healthy person to drop dead of these reasons? A. Yes, sir.

"Q. It would be a heart disease? A. Yes.

"Q. Am I right in the early morning of the 12th, you left home

until it happens.

"Mr. Bennett: I know that."

On the re-direct examination the following occurred:

"Q. Did I understand you to say therewas no way of determining this until it happened? A. That is correct."

The certificate of death furnished the Board of Health by Dr. Plaut contains the following:

"The principal cause of death and related causes of importance were as follows: Date of onset

Coronary Embolism 2/4/36

Toxic Myocarditis following Bronco pneumonia 1/25/36

Other contributory causes of importance:

Upper Respiratory Infection . . . . . Jan. 1, 1936"

The jury were justified, from a consideration of the entire testimony, in finding that the proximate cause of the death of Mrs. Rogers was bronchial pneumonia. The doctor testified that from his examinations of the patient and his medical experience his opinion was that "the cause of death was bronchial pneumonia which so injured the heart that she died suddenly from an acute collapse or an acute failure of the heart;" that in his examinations of the patient he looked for heart trouble and found none. It is a matter of common knowledge that in cases of pneumonia death finally results from heart failure. Indeed, any death is immediately preceded by a failure of the heart to function. It is an idle and unfair argument for defendant to contend that the heart failure that occurred in the instant case was heart disease within the meaning of the provision in the policy. The following language in the provision in question is very significant: "DISEASES: Should the member die within twelve months from the date of this certificate from heart disease, * * * or any chronic disease * * *." The purpose of the provision is obvious. The testimony of the doctor shows that the heart weakness developed suddenly and that within three or four minites after it developed Mrs. Rogers was dead.

until it happens.

"Mr. Bennett: I know that."

On the re-direct examination the following occurred:

"Q. Did I understand you to say there was no way of determining this until it happened? A. That is correct."

The certificate of death furnished the Board of Health by Dr. Hunt contains the following:

"The principal cause of death and related causes of importance were as follows: Date of onset
Coronary thrombus 5/6/36
Toxic hypostatic infection
Bronco pneumonia 5/12/36

Other contributory causes of importance:
Upper Respiratory Infection . . . . . Jan. 1, 1936"

The jury were justified, from a consideration of the entire testimony, in finding that the proximate cause of the death of Mrs. Rogers was bronchial pneumonia. The doctor testified that from his examinations of the patient and his medical experience his opinion was that "the cause of death was bronchial pneumonia which so injured the heart that she died suddenly from an acute collapse or an acute failure of the heart;" that in his examinations of the patient he looked for heart trouble and found none. It is a matter of common knowledge that in cases of pneumonia death finally results from heart failure. Indeed, any death is immediately preceded by a failure of the heart to function. It is an old and well recognized fact of medicine to contend that the heart failure that occurred in the instant case was heart disease within the meaning of the provision in the policy. The following language in the provision in question is very significant: "DISEASES: Should the member die within twelve months from the date of this certificate from heart disease, * * * or any chronic disease * * *." The purpose of the provision is obvious. The testimony of the doctor shows that the heart weakness developed suddenly and that within three or four minutes after it developed Mrs. Rogers was dead.

In Mutual Life Ins. Co. v. Dodge, 11 F. (2d) 486, the court said (p. 489): "The words 'bodily infirmity or disease' are frequently used in policies of insurance and have a well understood meaning. They are construed to be practically synonymous, and to refer only to an ailment or disease of a settled character." In Meyer v. Fidelity & Casualty Co., 65 N. W. 328, the court held that the words "disease" or "bodily infirmity," as used in a provision in an accident policy exempting insured from liability for injuries caused thereby, mean practically the same thing, and only include an ailment or disorder of a somewhat established or settled character, and not merely a temporary disorder, arising from some sudden and unexpected derangement of the system, though it produces unconsciousness. In 14 R. C. L. p. 1244, the author states (sec. 422): "The words 'disease' and 'bodily infirmity,' as used in an accident insurance policy excepting liability for injury caused thereby, mean, practically, the same thing, and refer to some ailment or disorder of a somewhat established and settled character, some physical disturbance to which the insured is subject, and of which an attack causing him an injury is, in some measure, a recurrence; and they have no reference to any temporary disorder which is new and unusual, and arises from some sudden and unexpected derangement of the system, though it produces or causes unconsciousness." See, also, Cooley's Briefs on Insurance (2d) Vol. 6, p. 5341; and Ballentine's Law Dictionary, where the word "disease" is defined as "an ailment or disorder of an established or settled character."

In the instant case the jury very properly found, under the evidence, that the proximate cause of the death of Mrs. Rogers was pneumonia, and we would be entirely unjustified in holding that their finding was not warranted by the proof. In Central Accident Ins. Co. v. Rembe, 220 Ill. 151, the policy exempted the company from liability if death resulted from the "taking of poison or

from liability if death resulted from the taking of poison or
Ins. Co. v. Lemke, 219 Ill. 191, the policy exempted the company
In Mutual Life Ins. Co. v. Dodge, 11 N. (2d) 466, the court said
(p. 469): "The words 'bodily infirmity or disease' are frequently
used in policies of insurance and have a well understood meaning.
They are construed to be practically synonymous, and to refer only
to an ailment or disease of a settled character." In Myers v.
Fidelity & Casualty Co., 89 S. W. 865, the court held that the terms
"disease" or "bodily infirmity," as used in a provision in an accident
policy excepting injuries from liability for injuries caused thereby,
mean practically the same thing, and only include an ailment or dis-
order of a permanent character or settled character, and not merely
a temporary disorder, arising from some sudden and unexpected de-
rangement of the system, though it produces unconsciousness. In 14
R. C. L. p. 1244, the author states (sec. 439): "The words 'disease'
and 'bodily infirmity,' as used in an accident insurance policy ex-
cepting liability for injury caused thereby, mean, practically, the
same thing, and refer to some ailment or disorder of a somewhat es-
tablished and settled character, some physical disturbance to which
the insured is subject, and of which an effect resulting him an injury
is, in some measure, a recurrence; and they have no reference to any
temporary disorder which is new and unusual, and arises from some
sudden and unexpected derangement of the system, though it produces
or causes unconsciousness." See, also, Conley's Price on Insurance
(2d) Vol. 6, p. 5841; and Bollenbach's Law Dictionary, where the word
"disease" is defined as "an ailment or disorder of an established or
settled character."

In the instant case the jury very properly found, under the
evidence, that the proximate cause of the death of Mrs. Rogers was
pneumonia, and he would be entirely unjustified in believing that
their finding was not warranted by the proof. In Mutual Accident

contact with poisonous substance," and in that case the insured, a physician, accidentally wounded his finger in an attempt to uncork a bottle, the neck of which broke, while attending a syphilitic patient, the virus from the patient entering the wound, causing fatal blood poisoning. The Supreme court held that, under the facts, the provision in question in the policy did not exempt the company from liability. The ruling in that case is based upon the principle that the proximate cause of the death of the insured was the accidental wounding of his finger in an attempt to uncork the bottle. Many other cases to the same effect might be cited if it were necessary. In the instant case pneumonia was the moving force without which Mrs. Roger would not have died.

The judgment of the Municipal court of Chicago is a just one and it should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

contact with poisonous substance," and to that does the Director
a physician, medicinally examined may change be an attempt to
uncork a bottle, the fault of which brand, while attempting a
syphilitic patient, the virus from the patient entering the wound,
causing fatal blood poisoning. The Supreme Court held that, under
the facts, the physician in opening in the police did not exempt
the company from liability. The ruling in that case is based upon
the principle that the proximate cause of the death of the injured
was the accidental uncorking of the bottle in an attempt to uncork
the bottle. Many other cases to the same effect might be cited if
it were necessary. In the instant case preventing the the working
force without which Mrs. Cyper could not have died.

The judgment of the Municipal Court of Chicago is just one
and it should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Gaffiver, J., concur.

39876

294 I.A. 605

SALLY CHAIN STORES, INC., a corporation, MARTHA MAID MANUFACTURING CO., a corporation, ARNOLD, INC., a corporation, and J. W. HORWITCH,

Appellees,

v.

BERNARD ADLERBLUM and BERTHA ADLERBLUM,

Appellants.

INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order granting a temporary injunction upon the verified complaint. Before entering the order the trial court denied defendants' motion to dismiss the complaint.

The complaint alleges, in substance:

1. That on or about August 26, 1936, defendants, Bernard Adlerblum and Bertha Adlerblum, as lessors, entered into a lease with plaintiff, Sally Chain Stores, Inc., a corporation, as lessee, leasing for a term from November 15, 1936, to January 31, 1947, the premises known as the first and second floors of the building at 1115 Lake street, Oak Park, Illinois. (A copy of this lease is attached to the complaint.)

2. That lessee entered into possession of said premises on October 15, 1936, and transacted business therein until about March 31, 1937.

3. That shortly after entering into possession and about October 20, 1936, lessee entered into negotiations for a lease of a store at 1143 Lake street, Oak Park, Illinois, located less than 500 feet from the demised premises, and thereafter entered into a lease for said store, which it found to be more suitable for its business.

29876

29A I.A. 605

BALTY CHAIN STORE, INC., a corporation,
MARTIN REID MERCANTILE CO., a corporation,
ation, ALMOND, INC., a corporation, and
T. V. HOUGHTON,

Appellees,

v.

RICHARD ADLERBLUM and BERTHA ADLERBLUM,
Appellants.

APPEAL FROM DISTRICT COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order granting a temporary injunction upon the verified complaint. Before entering the order the trial court denied defendants' motion to dismiss the complaint.

The complaint alleged, in substance:

1. That on or about August 26, 1936, defendants, Bernard Adlerblum and Bertha Adlerblum, as lessors, entered into a lease with plaintiff, Baltz Chain Store, Inc., a corporation, as lessee, leasing for a term from November 15, 1936, to January 31, 1947, the premises known as the first and second floors of the building at 1118 Lake street, Oak Park, Illinois. (A copy of this lease is attached to the complaint.)

2. That lessee entered into possession of said premises on October 15, 1936, and transacted business therein until about March 31, 1937.

3. That shortly after entering into possession and about October 20, 1936, lessee entered into negotiations for a lease of a store at 1142 Lake street, Oak Park, Illinois, located less than 300 feet from the demised premises, and thereafter entered into a lease for said store, which it threatens to be more suitable for its business,

4. That on or about March 31, 1937, lessee advised the attorney for defendants that it would not continue to operate its business on defendants' premises demised under said lease, because it had leased and was about to occupy the premises at 1143 Lake street, Oak Park, Illinois, and advised said attorney that it was ready and willing to cancel its lease and surrender possession of the demised premises to defendants, if defendants so desired, and that in case defendants did not desire to cancel said lease, lessee would sub-let said premises; that defendants advised lessee that they did not desire to cancel the lease, but would keep lessee liable under the terms thereof; that on April 7, 1937, lessee sub-leased the demised premises to Martha Maid Manufacturing Co., a corporation, and Arnold, Inc., a corporation. (A copy of this lease is attached to the complaint.)

5. That pursuant to the request of defendant's attorney, attorneys for the sub-lessee on April 15, 1937, delivered a copy of the sub-lease to defendants' attorney; that at no time until the notice of May 6, 1937, did defendants or their attorney object to the sub-lease or the terms thereof.

6. That sub-lessees, on or about April 19, 1937, pursuant to the terms and provisions of the lease from defendants to Sally Chain Stores, Inc., with the consent and authority and on behalf of Sally Chain Stores, Inc., and pursuant to said sub-lease, proceeded to make alterations, repairs and remodeling in and about the demised premises (here follows a description of the alterations, repairs and remodeling); that the cost and fair value of said repairs, remodeling and alterations was in excess of $6,500 and enhanced the value of the building in which the demised premises are located to the extent of over $10,000; that said sublessees equipped said premises with fixtures at a cost of in excess of $2,000; that said fixtures are of no value,

4. That on or about March 31, 1937, Leeds advised the attorney for defendants that it would not continue to operate its business on defendants' premises unless said leases, because it had issued and was about to occupy the premises at 1441 Main Street, Des Moines, Iowa, and notified said attorney that he was ready and willing to cancel its leases and surrender possession of the demised premises to defendants, if defendants so desired, and that in case defendants did not desire to cancel said leases, Leeds would not-let said premises; that defendants advised Leeds that they did not desire to cancel the leases, but would keep Leeds Realty under the terms thereof; that on April 7, 1937, Leeds sub-leased the demised premises to Modern Home Furnishing Co., a corporation, and Arnold, Inc., a corporation. (A copy of this lease is annexed to the complaint.)

5. That pursuant to the request of defendants' attorney, attorneys for the sub-lessee on April 10, 1937, obtained a copy of the sub-lease to defendants' attorney; that at no time until the notice of May 6, 1937, did defendants or their attorney object to the sub-lease or the terms thereof.

6. That sub-lessees, on or about April 12, 1937, pursuant to the terms and provisions of the lease from defendants to Realty Chain Store, Inc., with the consent and authority and on behalf of Realty Chain Store, Inc., and pursuant to said sub-lease, proceeded to make alterations, repairs and remodeling in and about the demised premises (here follows a description of the alterations, repairs and remodeling); that the cost and fair value of said repairs, remodeling and alterations was in excess of $[illegible], and subsequent to the making of the repairs, remodeling and alterations and in which the demised premises are located to the extent of [illegible]; that said alterations, repairs and remodeling [illegible]

except in connection with the use and operation of said store and of no value if same are removed.

7. That prior to the commencement of said work by the sub-lessees, Sally Chain Stores, Inc., forwarded a copy of the plans thereof to defendants, which defendants refused to accept; thereafter, pursuant to the request of the attorney for defendants, lessee delivered to him a copy of said plans which has remained in the possession of defendants and their attorney.

8. That said repairs, remodeling and alterations were made pursuant to said plans and completed on or about May 6, 1937; that during the progress of said work, defendants knew that said work was being done; that defendants during all of said time were engaged in business at a distance less than 500 feet from the demised premises; that defendants saw said work being done; that defendant, Bernard Adlerblum, visited the demised premises daily during progress of said work and inspected same; that at no time during the progress of said work did defendants, or either of them, object to said work or the manner in which same was being done; that at no time prior to the completion of said work did defendants, or either of them, make any claim that any default, breach or violation of the terms of the lease from defendants to lessee existed.

"9. Since on or about May 7, 1937, plaintiffs, Martha Maid Manufacturing Co. and Arnold, Inc. have been in possession of said demised premises and have been conducting business therein, and their licensee or sub-lessee, Sherman Wash Wear, Inc. has been and is now in possession of a portion of the demised premises, conducting business therein; prior to the commencement of said repairs, remodelling and alterations, there was placed in front of said demised premises a barricade, and signs were painted upon said barricade, one of said signs being substantially in the following words, to-wit: 'Lanathan's opening soon with a complete line of hosiery, lingerie

and sportswear,' and one of said signs reading substantially as follows: 'Sherman's opening soon with a line of Cotton Frocks;' the name 'Lanathan's' is a trade name used by the plaintiffs, Martha Maid Manufacturing Co. and Arnold, Inc., and the name 'Sherman's' is a trade name used by Sherman Wash Wear, Inc.; said signs remained upon said barricade and were visible from the street and sidewalk adjoining the demised premises throughout the period of said repairs, remodelling and alterations, and were seen daily by the defendants, and at no time prior to May 7, 1937, did the defendants, or either of them, object to the proposed occupancy of the demised premises by said firms."

10. That on May 3, 1937, lessee mailed to defendants its check for $350, being the amount of the fixed rental of $600 for the month of May, 1937, less $250 provided in said lease, to be deducted and retained by the lessee for twenty-four months toward the cost of said repairs, remodeling and alterations; that on or about May 7, 1937, lessee received from defendants a notice accompanied by said check of $350; that said notice was the first given by defendants, or either of them, of any alleged claim of defendants of a default, and to the effect that defendants claimed that lessee is not entitled to said deduction of $250 a month; that none of the alleged defaults and breaches mentioned in said notice existed, and no default or breach now exists under said lease from defendants to lessee; that even if any default or breach did exist prior to May 6, 1937, defendants are in equity and good conscience estopped to claim any such alleged breach or default or violation of said lease, after having permitted, with full knowledge on their part and without objection, the expenditure of large sums of money in and about said repairs, remodeling and alterations of said premises as above stated, and the defendants have, by their conduct, waived any and all alleged

breaches or violations of the terms of said lease.

11. That on June 16, 1937, defendants, without notice to lessee, caused a judgment by confession to be entered against said Sally Chain Stores, Inc., for the sum of $1,347.50, representing the amount alleged to be due as rent for the months of May and June, 1937, plus attorney's fees, in case No. 37-C-7299, Circuit Court of Cook County; that, thereafter, on motion of Sally Chain Stores, Inc., said judgment was vacated and an answer to the complaint therein was filed by Sally Chain Stores, Inc., setting forth that the amount due as rent for the months of May and June, 1937, under said lease was the sum of $700; and that said amount was tendered to the defendants prior to the institution of said suit; that on July 8, 1937, lessee paid to defendants $700, "which was accepted by the defendants without prejudice to the claim of the defendants for the additional sum of $500, claimed by them to be due in addition to said sum of $700, and without prejudice to the defense of said Sally Chain Stores, Inc., to said claim, it being agreed that said cause be set for trial as to such balance claimed to be due; said cause now remains pending and undisposed of."

12. That on June 17, 1937, defendants served upon Sally Chain Stores, Inc., a notice marked "Exhibit D;" that on June 16, 1937, defendant served upon plaintiff, Martha Maid Manufacturing Co. and on June 17, 1937, upon plaintiff, Arnold, Inc., and upon Sherman Wash Wear, Inc., their written demand to vacate and surrender the demised premises to defendants.

13. That on July 15, 1937, defendants filed in the Superior Court of Cook County, case No. 37-S-9014, their complaint in forcible detainer against the plaintiffs, Martha Maid Manufacturing Co., Arnold, Inc., Sherman Wash Wear, Inc., a corporation, J. W. Horwitch, doing business as Lanathan's, and Harry Sherman, doing business as Sherman

premises or violations of the terms of said lease.

11. That on June 1, 1927, defendants, without notice to plaintiff, caused a judgment by confession to be entered against said Daily Chain Stores, Inc., for the sum of $3,247.80, representing the amount claimed to be due as rent for the months of May and June, 1927, plus attorney's fees, in case No. 27-C-7258, Circuit Court of Cook County; that, thereafter, on motion of Daily Chain Stores, Inc., said judgment was vacated and an answer to the complaint therein was filed by Daily Chain Stores, Inc., setting forth that the amount due as rent for the months of May and June, 1927, under said lease was the sum of $700; and that said amount was tendered to the defendants prior to the institution of said suit; that on July 8, 1927, Lessee paid to defendants $700, "which was accepted by the defendants without prejudice to the claim of the defendants for the additional sum of $800, claimed by them to be due under said lease for the month of June, 1927, and without prejudice to the defense of said Daily Chain Stores, Inc., to said claim, it being agreed that said sum should be set for trial as to such balance claimed to be due by defendants pending and undisposed of."

12. That on June 17, 1927, defendants served upon Daily Chain Stores, Inc., a notice styled "Notice To" that on June 18, 1927, defendants served upon plaintiff, North Side Realty Co., and on June 17, 1927, upon plaintiff, Arnold, Inc., our Lyon Dearborn Park Hotel, Inc., their written demand to vacate and surrender the leased premises to defendants.

13. That on July 18, 1927, defendants filed in the Superior Court of Cook County, case No. 27-C-6014, their complaint in ejectment against the plaintiff, North Side Realty Co., Arnold, Inc., Lyon Dearborn Park Hotel, Inc., a corporation, et. al. Eventually, during pendency of [illegible], and Daily Chain Stores, Inc., being substituted as plaintiff in place of North Side Realty Co., Arnold,

Shops, to recover from defendants in said cause possession of the demised premises; that summons issued in said cause returnable on the third Monday of August, 1937.

14. That in addition to the $8,500 expended by sub-lessees, they and Sherman Wash Wear, Inc., have invested a substantial sum in the business conducted by them in the demised premises and have incurred numerous obligations in connection with said premises; that if defendants are permitted to oust said plaintiffs from possession of the demised premises, plaintiffs will be unjustly and illegally deprived of their property and defendants will be unjustly enriched, contrary to equity and good conscience.

15. That said plaintiffs are now in possession of said demised premises and are conducting their business therein, and if deprived of such possession, the damages sustained by them by the loss of future business will be impossible of ascertainment and irreparable; that defendants have stated that they will continue to harass lessees and its sub-lessees unless Sally Chain Stores, Inc., agrees to waive its right to retain out of the rents the sum of $6,000 provided for in said lease, and in addition will pay defendants $10,000.

16. That lessee has at all times complied and is ready, willing and able at all times to comply with said lease; that lessee has paid to defendants all of the rent which has heretofore accrued under the terms of said lease, and is ready, willing and able to continue to pay all rents coming due under said lease.

17. "That the conduct of the defendants, as hereinabove set forth, is a part of an unconscionable, unequitable and illegal plan and design to deprive plaintiffs, and each of them, of their rights under said lease from the defendants to Sally Chain Stores, Inc., and of their investment in the demised premises; by reason of the conduct of the defendants they are in equity and good conscience

the conduct of the defendants they are in equity and good conscience
Inc., and of their investment in the drilled premises; by reason of
plan and design to deprive plaintiff, and each of them, of their
rights under said lease from the defendants to Daily Drain stores,
set forth, is a part of an unconscionable, unethical and illegal

17. "That the conduct of the defendants, as hereinbefore
to pay all rents coming due under said lease.

the terms of said lease, and is ready, willing and able to continue
paid to defendants all of the rent which the lease required under
ing and able at all times to comply with said lease; that Lessee has

16. That Lessee has at all times complied and is ready, will-

said lease, and in addition will pay defendants $10,000.

its right to retain out of the rents the sum of $5,000 provided for in
and its sub-lessee wishes daily drain stores, Inc., agrees to waive
that defendants have stated that they will continue to pursue Lessee
of future business will be impossible of ascertainment and irreparable

15. That said plaintiffs are now in possession of said de-
mised premises and are conducting their business thereon, and if de-
prived of such possession, the damages sustained by them by the loss
of future business will be impossible of ascertainment and irreparable

14. That in addition to the $5,000 expended by Lessee,
they and Shelton Real Corp., Inc., have invested a substantial sum in
the business conducted by them in the demised premises and have in-
curred numerous obligations in connection with said premises; that if
defendants are permitted to oust said plaintiffs from possession of
the demised premises, plaintiffs will be unjustly and illegally de-
prived of their property and defendants will be unjustly enriched,
contrary to equity and good conscience.

13. That said plaintiffs are now in possession of said de-
mised premises and are conducting their business thereon, and if de-
prived of such possession, the damages sustained by them by the loss
of future business will be impossible of ascertainment and irreparable
that defendants have stated that they will continue to pursue Lessee
and its sub-lessee wishes daily drain stores, Inc., agrees to waive
its right to retain out of the rents the sum of $5,000 provided for in
said lease, and in addition will pay defendants $10,000.

16. That Lessee has at all times complied and is ready, will-
ing and able at all times to comply with said lease; that Lessee has
paid to defendants all of the rent which the lease required under
the terms of said lease, and is ready, willing and able to continue
to pay all rents coming due under said lease.

17. "That the conduct of the defendants, as hereinbefore
set forth, is a part of an unconscionable, unethical and illegal
plan and design to deprive plaintiffs, and each of them, of their
rights under said lease from the defendants to Daily Drain stores,
Inc., and of their investment in the drilled premises; by reason of
the conduct of the defendants they are in equity and good conscience

estopped and precluded from prosecuting said forcible detainer proceedings, and from claiming the existence of any breach or violation under the terms of their said lease to Sally Chain Stores, Inc.

"Wherefore plaintiffs, being without remedy, except in a Court of Equity, pray:

"1. That this Court may immediately and pending the final hearing herein, enjoin and restrain the defendants (a) From terminating or attempting to terminate said lease from defendants to Sally Chain Stores, Inc., or the right of possession thereunder; (b) From prosecuting said forcible detainer proceedings above mentioned, being case No. 37-S-9014; (c) From interfering with the possession of plaintiff, Sally Chain Stores, Inc., and of its subtenants, Martha Maid Manufacturing Co. and Arnold, Inc., and of said Sherman Wash Wear, Inc.; (d) From prosecuting said proceedings above mentioned, being cause No. 37-C-7299;

"2. That upon the final hearing such injunction may be made permanent;

"3. That this Court determine the amount of rental payable under said lease from the defendants to Sally Chain Stores, Inc.;

"4. That plaintiffs may have such other and further relief in the premises as to equity may appertain and to this Court seem proper."

The order appealed from enjoined defendants: "(a) from terminating, or attempting to terminate the lease described in the complaint, from said defendants to the plaintiff, Sally Chain Stores, Inc., or the right of possession thereunder by reason of anything alleged in the complaint; (b) from prosecuting the forcible detainer proceedings mentioned in said complaint, pending in the Superior Court of Cook County, cause No. 37S 9014, entitled 'Bernard Adlerblum and Bertha Adlerblum, Plaintiffs, vs. Martha Maid Manufacturing Co., a corporation, Arnold, Inc., a corporation, Sherman Wash Wear, Inc.,

enjoined and restrained from prosecuting said forcible detainer pro-
ceedings, and from claiming the existence of any lease or tenancy
under the terms of Exhibit said Lease to Daily Chain Stores, Inc.

"Therefore Plaintiff", being duly sworn, deposes in a
Court of Equity, says:

"1. That this Court may immediately and pending the final
hearing hereof, enjoin and restrain the Defendants (a) from commen-
cing or attempting to terminate said Lease from Defendants to Daily
Chain Stores, Inc., or the rights of possession thereunder; (b) from
prosecuting said forcible detainer proceedings above mentioned, being
cause No. 37-3-3014; (c) from interfering with the possession of Plain-
tiff, Daily Chain Stores, Inc., and of its subtenants, by the said
Manufacturing Co. and Wood, Inc., and of said Lessee Main Post,
Inc.; (d) from prosecuting said proceedings above mentioned, being
cause No. 37-3-7009;

"2. That upon the final hearing such injunction may be made
permanent;

"3. That this Court determine the amount of rental payable
under said Lease from the defendants to Daily Chain Stores, Inc.;

"4. That Plaintiff may have such other and further relief
in the premises as to equity may appertain and to this Court seems
proper."

The order appealed from contains the following findings:
"(a) From ter-
minating, or attempting to terminate the Lease described in the com-
plaint, from said defendants to the plaintiff, Daily Chain Stores,
Inc., or the rights of possession thereunder by reason of matters
alleged in the complaint; (b) from prosecuting the forcible detainer
proceedings mentioned in said complaint, pending in the Superior Court
of Cook County, cause No. 378 3014, entitled "Bertha Alexander and
Bertha Alexander, Plaintiff", vs. Morris Gold Manufacturing Co., a
Corporation, Wood, Inc., a Corporation, Thurman Main Post, Inc.,

a corporation, J. W. Horwitch, doing business as Lanathans, and Harry Sherman, doing business as Sherman Shops, defendants;' (c) from interfering with the possession by plaintiffs and Sherman Wash Wear, Inc., of the premises known as the first and second floors of the building known as 1115 Lake Street, in the Village of Oak Park, Cook County, Illinois; by reason of anything alleged in the complaint. (d) from prosecuting the proceedings pending in this Court, mentioned in said complaint, being cause No. 37C 7299, entitled 'Bernard Adlerblum and Bertha Adlerblum, Plaintiffs, vs. Sally Chain Stores, Inc., a corporation, Defendant.'"

Defendants contend that "the complaint herein does not set forth any facts which entitled plaintiffs to relief by injunction, or to any other relief herein. The matters alleged in the complaint are available as a defense in the forcible detainer suit and in the suit for rent." We find no merit in this contention. It seems clear to us that the allegations of the complaint make out a case that justified the court of equity in assuming jurisdiction. That the instant equitable proceeding can fully and fairly determine the rights of all of the parties is not disputed and we are not impressed with the argument that the rights of plaintiffs can be fully protected in the legal proceedings. Moreover, it does not follow that because a remedy at law is afforded in a case equity will not also take jurisdiction of the same state of facts. If the remedy in equity is more adequate because of special circumstances in the situation, the jurisdiction of equity will be sustained. (See Mayer v. Collins, 263 Ill. App. 219, 224, and cases cited therein.) We think that the instant case is one to which the above rule applies.

Defendants contend, "the complaint upon which the court below based the injunctional order alleges facts which disclose that plaintiffs come into equity with unclean hands." In support of this contention defendants refer to the allegations in paragraph 9

a corporation, T. W. Hamilton, Grady Hathaway or Theodosia, and Henry Bowman, Corpus Juris or Lawyers' Reports, Lawyers' Edition, Bancroft-Whitney or Lawyers Co-op., Interstate, Law Book Co., Vernon's Texas Statutes, Texas Digest, Texas Jurisprudence or Texas Law Review, Texas Practice, Texas Law Publishing Co., Inc., or Corpus Juris Secundum."

Defendants contend that "the complaint herein does not set forth any facts which entitled plaintiff to relief by injunction, or to any other relief herein. The matters alleged in the complaint are available on a defense in the juvenile detainer suit and in the suit for rent." We find no merit in this contention. It seems clear to us that the allegations of the complaint make out a case that justified the issue of equity in assuming jurisdiction. That the instant equitable proceeding can fully and fairly determine the rights of all of the parties is not disputed and we are not impressed with the argument that the rights of plaintiffs can be fully protected in the legal proceedings. Moreover, it does not follow that because a remedy at law is afforded in a case equity will not also take jurisdiction of the same cause of facts, if the remedy is equally as adequate because of special circumstances in the situation, the jurisdiction of equity will be sustained. See cases 4 Pomeroy, Sec. 1711, pp. 258, 264, and other cases cited. We think that the instant case is one to which the above rule applies.

Defendants contend, "The complaint does not show that plaintiff has exhausted [illegible] remedies." The purpose of this contention defendants refer to the allegations in paragraph 9

of the complaint, and they argue that "the carrying on by plaintiffs, Martha Maid Manufacturing Co. and Arnold, Inc. of their business under the name 'Lanathan's,' which is a name other than their corporate names, the carrying on by their sublessee, Sherman Wash Wear, Inc. of their business under the name of 'Sherman's' which is a name other than its corporate name, and their putting forth signs and advertisements in which they assume names other than their corporate names, are clear and admitted violations of the above provisionof the Illinois Criminal Code [sec. 220, par. 452, Ill. State Bar Stats. 1935]." This contention is clearly an afterthought. Before entering the injunctional order the trial court denied defendants' motion to dismiss the complaint. In that motion defendants do not aver that plaintiffs come into court with unclean hands, and they are not now in a position to raise that defense. Their contention that the allegations of paragraph 9 of the complaint show that plaintiffs have violated paragraph 452 of the statute is rather far fetched. Moreover, even if the allegations showed a violation, that fact would not affect the issues in the instant case. Under the settled law, even if plaintiffs or any of them had used a name in violation of the statute, they would not be denied relief in equity in the absence of a showing of injury or loss to the defendants by reason of the use of the name.

There is no merit in this appeal, and the injunctional order of the Circuit court of Cook county is affirmed.

INJUNCTIONAL ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

39899

HOMER PUCKETT,
Appellee,

v.

AMERICAN LIFE OF ILLINOIS,
a corporation,
Appellant.

20 A

APPEAL FROM CIRCUIT COURT,
COOK COUNTY

294 I.A. 605[4]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, beneficiary, sued upon two policies of insurance, dated April 9, 1934, in which defendant insured Stella Puckett, wife of plaintiff, in the sums of $310 and $67.50, respectively. The complaint alleges that Stella Puckett died on September 28, 1935; that plaintiff and the insured had performed all things to be performed by them under the contracts, or that if such things had not been performed there had been a waiver of the same by defendant; that the sums due under the policies had not been paid. Defendant, in its verified answer, admits that the policies were written, but avers that it had not received from the insured, plaintiff, or any other person, the premiums due upon the policies and that the policies were not at the time of the death of Stella Puckett or at any other time in force; avers that the insured and beneficiary had not performed all matters and things to be performed by them respectively, and that none of the provisions of the policies had been waived by defendant; that the policies were issued for the purpose of submitting them to Stella Puckett and plaintiff for inspection and acceptance, and that the same had not been accepted, nor had any premiums been paid thereon. After the filing of the answer plaintiff filed a motion for summary judgment, which motion was allowed and judgment was entered

29414.605

35939

HOMER PUCKETT,
Appellee,

v.

AMERICAN LIFE OF ILLINOIS,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY

MR. JUSTICE SCHMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, beneficiary, sued upon two policies of insurance, dated April 9, 1934, in which deceased insured Stella Puckett, wife of plaintiff, in the sums of $310 and $[illegible].50, respectively. The complaint alleges that Stella Puckett died on September 25, 1936; that plaintiff and the insured had performed all things to be performed by them under the contracts, or that if such things had not been performed there had been a waiver of the same by defendant; that the sums due under the policies had not been paid. Defendant, in its verified answer, admits that the policies were written, but avers that it had not received from the insured, plaintiff, or any other person, the premiums due upon the policies and that the policies were not at the time of the death of Stella Puckett or at any other time in force; avers that the insured and beneficiary had not performed all matters and things to be performed by them respectively, and that none of the provisions of the policies had been waived by defendant; that the policies were issued for the purpose of submitting them to Stella Puckett and plaintiff for inspection and examination, and that the same had not been accepted, nor had any premiums been paid thereon. After the filing of the answer plaintiff filed a motion for summary judgment, which motion was allowed and judgment was entered

against defendant for the face value of the policies, with costs. Defendant appeals. Plaintiff has not seen fit to defend the judgment.

Plaintiff's motion for summary judgment was supported by three affidavits. The first, that of Stuart B. Krohn, attorney for plaintiff, sets forth several letters that passed between defendant and affiant; states that the first, dated March 22, 1937, written by affiant and addressed to defendant, stated that the writer was inclosing claimant's statement and also an affidavit in connection therewith; further states that the writer had difficulty in getting the necessary information due to the fact that plaintiff could neither read nor write and did not know much about the subject matter, and that if any further information was required he would endeavor to furnish it. Affiant further states that he received a letter from defendant, dated April 2, 1937, which acknowledges the receipt of the letter of March 22, 1937, and states that according to the records of the company the two policies were issued but that the record showed that they had lapsed due to nonpayment of the first premiums due April 9, 1934, and that since plaintiff has neither the policies nor the premium receipt book in his possession, defendant asks that it be furnished with some form of receipt showing the name of the collector; that the said letter further states that the writer had been in direct charge of all claims against defendant since early in 1934, that the company has no record of any claim reported by plaintiff prior to April 11, 1936, that at that time the company did not have sufficient information to conduct an investigation, and that if any person had represented himself as an inspector of defendant in taking a statement from Edward R. Budd, it was without the knowledge of the company. The affiant further states that he answered that letter on April 5, 1937, and in said answer stated that he wished to

against defendants for the face value of the policies, with costs. Defendant appeals. Plaintiff has not seen fit to perfect the judgment.

Plaintiff's motion for summary judgment was supported by three affidavits. The first, that of Robert B. Brown, attorney for plaintiff, sets forth several letters that passed between defendant and affiant; states that the first, dated March 25, 1927, written by affiant and addressed to defendant, stated that the notice of inflating claimant's statement and also an affidavit in connection therewith; further states that the writer had difficulty in getting the necessary information due to the fact that plaintiff could neither read nor write and did not know much about the subject matter, and that if any further information was required he would endeavor to furnish it. Affiant further states that he received a letter from defendant, dated April 5, 1927, which acknowledges the receipt of the letter of March 25, 1927, and states that according to the records of the company the two policies were issued but that the record showed that they had lapsed due to nonpayment of the first premiums due April 5, 1926, and that since plaintiff had neither the policies nor the premium receipt book in his possession, defendant asks that it be furnished with some form of receipt showing the name of the collector; that the said letter further states that the writer had been in direct charge of all claims against defendant since early in 1923, that the company has no record of any claim reported by plaintiff prior to April 11, 1926, that at that time the company did not have sufficient information to commence an investigation, and that if any person had represented himself as an inspector of defendant in taking a statement from Oscar S. Lund, it was without the knowledge of the company. The affiant further states that he answers that letter on April 5, 1927, and in said answer stated that he wished to

advise defendant that it was in error in assuming that they did not have the policies, as both policies were in their possession. The affidavit further states that a letter was received from defendant, dated April 6, 1937, which states that plaintiff will please read his policies and file proofs accordingly, and also furnish defendant company with a certified copy of death. The affidavit further states that affiant later received a letter from defendant stating that in connection with the telephone conversation of that day the company was inclosing a physician's statement to be filled out by the insured's physician and returned to defendant with proofs of death; that the affiant later wrote defendant that he was inclosing the original policy, also the physician's statement and a certified copy of the death certificate of Stella Puckett; that defendant at no time notified affiant that there were any terms or conditions of the policies not complied with by Homer Puckett or by affiant; that defendant never claimed that the insurance policies were not executed and delivered to Puckett. The second affidavit, made by Edward R. Budd, states that Homer Puckett could neither read nor write, and that during the months of July, August and September, 1935, affiant paid the premiums on the policies to a party who represented himself to be a collector of defendant; that these premiums were paid at the place of business where affiant and plaintiff were employed, and that as the payments were made they were entered in the premium receipt book kept by affiant for safe keeping; that the practice of entering payments in the receipt book was discontinued in the latter part of September or the first part of October, 1935, due to the fact that the said collector stated to affiant that he wished to take the premium receipt book to the office of defendant to segregate the various accounts on the policies mentioned therein, and that he would

return new books shortly; that the new books were never returned and that in the interim payments were made with the assurance that they would be entered in the new books; that after the death of Stella Puckett a certain person, representing himself to be an inspector of defendant, called upon affiant and obtained from him a statement concerning the payments upon the policies and that such statement should be in the files of defendant. The third affidavit was that of plaintiff. It sets forth that he procured the policies and handed them and the premium receipt book to Edward R. Budd for safe keeping; that affiant corroborates the statement of Budd as to the payment of premiums upon the policies, the surrender of the receipt book, and the failure of the alleged collector to return the new books to him; that affiant at no time received from defendant a notice of cancellation of the policies or that they had lapsed; that after the death of Stella Puckett affiant called at defendant's office to present his claim, at which time he was offered $100 and credit for a year's premium on his own policy, which offer he refused.

In opposition to the motion for summary judgment defendant offered its affidavit of defense, and three affidavits. The first, made by Alvin Borchardt, vice president and actuary of defendant, states that affiant is in charge of the records of defendant which show the receipt of premiums upon all policies issued by it; that the policies in question were written by defendant and given to the agent, Patrick Fluskey, who had taken the applications therefor, for delivery, together with the premium receipt book to be used in recording premiums paid thereon; that the first premiums were never paid on the policies and on April 23, 1934, the policies were duly lapsed for nonpayment of premiums; that at all times since the policies have appeared on the books of defendant as lapsed policies; that they have never been revived or reinstated; that during July, August and September, 1935, no premiums

were received by defendant on such policies and that no premium receipt book in connection with the policies was ever received by defendant; that affiant is the person who wrote the letters that are set forth in the affidavit of Stuart B. Krohn; that the letters were written in connection with certain proofs of death which Krohn wished to file on behalf of plaintiff; that the letters were written and the proofs of death were sent to defendant in pursuance of the policy of defendant to permit any person holding a policy of the company to complete and file death proofs in connection with any claim on such policy, and that when the claim is made it is then duly passed upon by the company. The affiant further states that he caused diligent inquiry to be made among the agents of defendant and that he could find no agent who had collected any premiums upon such policies. The second affidavit, that of Patrick Fluskey, sets forth that he took the applications for the policies; which policies were issued by defendant and delivered to him on April 9, 1934, together with the premium receipt book; that he gave the policies and the premium receipt book to Homer Puckett and requested the payment of the first premiums thereon; that Puckett stated that he wished to submit the policies to his wife, the insured, and Puckett took and received the policies for such purpose; that several days later Puckett advised affiant that his wife, the insured, did not wish the policies and refused to pay the premiums thereon; that after endeavoring for several weeks to secure acceptance of the policies by Puckett or his wife, affiant reported the policies lapsed to defendant and marked the same as lapsed on his premium collection book and upon the records handed by him to defendant in connection with his employment; that he at no time collected any premiums on such policies; that he had no other or further dealings with plaintiff in connection therewith than are set forth in his

affidavit; that he left the employment of defendant on May 4, 1934. The third affidavit is that of Frank J. Welch. It states that in October, 1935, affiant was superintendent of agents of defendant; that plaintiff on or about October 5, 1935, called at the office of defendant and stated that he wished to have revived certain policies on the life of his wife, Stella Puckett; that plaintiff further stated to affiant that he did not have the policies with him; that affiant, at the request of plaintiff, called at the premises where plaintiff and Edward R. Budd were employed, for the purpose of seeing plaintiff in connection with the request for reinstatement; that plaintiff was absent at the time; that affiant talked with a person in charge of the business conducted on the premises and stated to said party that he was there in connection with the reinstatement of the policies in question; that the said party stated to affiant that he had paid, for some time, premiums upon certain policies of defendant; that the payments had been made to a person representing himself to be an agent of defendant. Affiant further states that he asked the party whether the wife of plaintiff was in good health at that time and said party answered that Stella Puckett had died a few days previous thereto; that affiant thereupon advised the party that the policies could not be revived or reinstated; that he then reported to his superiors that Stella Puckett had died.

The motion for the summary judgment was based upon paragraph 181, section 57, of the Practice Act (Ch. 110, Ill. Rev. Stat. 1937.)

Defendant strenuously contends that under the record the trial court erred in granting plaintiff's motion for a summary judgment. The contention is a meritorious one. The purpose of the summary judgment contemplated by section 57 is to provide a means to avoid the expense and delay of a trial when no sound defense exists. The affidavits introduced by defendant in opposition to the motion

affidavits; that he left the employment of defendant on May 4, 1934. The third affidavit is that of Frank A. Welch. It shows that in October, 1933, affiant was employed as agents of defendant; that plaintiff on or about October 3, 1933, called at the office of defendant and stated that he wished to have service certain policies on the life of his wife, stating further that plaintiff further stated to affiant that he did not have the policies with him; that affiant, at the request of plaintiff, called at the premises where plaintiff and Edward R. Judd were employed, for the purpose of getting plaintiff in connection with the request for substatement; that plaintiff was absent at the time; that affiant talked with a person in charge of the premises and was informed and stated to said party that he was there in connection with the statement of the policies in question; that the said party handed to affiant that he had just, for some time, previous upon certain policies of defendant; that the payments had been made to a person representing himself to be an agent of defendant. Affiant further states that he asked the party whether the wife of plaintiff was in good health at that time and said party answered that Stella Judd had also a few days previous thereto; that affiant thereupon advised the party that the policies could not be revived or reinstated; that he then reported to his superiors that Stella Judd had died.

The motion for the summary judgment was based upon section 1281, section 17, of the Practice Act (Ch. 110, Ill. Rev. Stat. 1933.)

Defendant strenuously contends that under the record the trial court erred in granting plaintiff's motion for a summary judgment. The contention is a meritorious one. The purpose of the summary judgment contemplated by section 17 is to provide a means to avoid the expense and delay of a trial when no real defense exists. The affidavits introduced by defendant in opposition to the motion

for a summary judgment make out a clear prima facie showing that no premiums had been paid upon the policies and that they had lapsed long prior to the date of the death of the insured. Indeed, the affidavit of the superintendent of agents of defendant avers that plaintiff, on October 5, 1935, seven days after the death of Stella Puckett, called upon the superintendent and stated that he wished to have the policies revived. Defendant insists that upon a trial of the cause where it will have an opportunity to cross-examine plaintiff's witnesses it will be able to sustain its defense to the claim. Defendant further contends that waiver of its defense cannot be implied from the mere fact that it furnished blanks to the beneficiary for the making of proofs of claim; that the affidavit of Alvin Borchardt shows that defendant, by suggesting the filing of proofs of claim and accepting them, was acting in accordance with the policy of the company to permit any person to complete and file death proofs in connection with any claim on a policy; that it will appear upon a trial that the blank proofs of loss furnished by defendant to plaintiff contained in bold-faced type the following: "This Blank is furnished (upon application) for the convenience and assistance of the representatives of the insured; and the organization reserves the right to consider and determine the question of its liability under any policy or certificate without prejudice or presumption or waiver by reason of the furnishing thereof," and defendant has made a motion in this court, in accordance with section 92(d) of the Civil Practice Act, for leave to file a photostatic copy of the proofs of claim submitted by plaintiff to defendant in the instant case. What purports to be a photostatic copy of the proofs of claim is attached to the affidavit filed in support of the motion. While it is true that in the alleged correspondence between the parties defendant suggested the filing of proofs of claim, the correspondence also

clearly discloses that defendant was insisting that no premiums had been paid on the policies and that the records of the company showed that the policies had lapsed due to nonpayment of the first premiums. In Showalter v. Modern Woodmen, 156 Mich. 390, it was held that no waiver of defense could result from a furnishing of blanks to the beneficiary for the making of proofs of claim, where in the correspondence between the company and the beneficiary's lawyers, the same defense was insisted upon as was urged at the trial. Other cases to the same effect might be cited. A waiver of defense arises only where the insurer by its conduct leads the beneficiary to believe that it will not insist upon the defense. In any event, under the record defendant had a right to have a jury pass upon the question of fact as to whether or not it had waived its defense. The last paragraph of the last letter written by plaintiff's attorney contains the following: "Will you kindly let us hear from you at your earliest convenience as to whether this matter can be adjusted amicably, without litigation." This language indicates clearly that plaintiff's counsel did not understand from the correspondence that defendant was waiving its defense.

We are satisfied that a summary judgment should not have been entered in the instant case.

The judgment of the Circuit court of Cook county is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

39051

ISADORE COHEN,
Appellee,

v.

SYD FINEMAN and MAX GERRICK,
Appellants.

21A

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

294 I.A. 606

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $2,000 entered upon the verdict of a jury against defendants, Syd Fineman and Max Gerrick, in an action brought by plaintiff, Isadore Cohen, for personal injuries alleged to have been sustained by him while riding as a guest in an automobile driven by defendant Fineman, which automobile crashed into the rear of an automobile owned and driven by one Melvin A. Hansen, who was also made a defendant. The jury returned a separate verdict finding Hansen not guilty and judgment was entered as to him in accordance with said verdict. Plaintiff filed a notice of cross-appeal of the judgment in favor of Hansen, but having failed in his brief to assign error as to same here, it may be considered as having been abandoned.

The case went to trial upon plaintiff's amended complaint, the pertinent allegations of which, in so far as they concern the defendants, Fineman and Gerrick, are as follows:

"1. That on the 1st day of April, 1934, the defendants SYD FINEMAN and MAX GERRICK were co-partners, trading as FINEMAN and GERRICK.

"2. That as such co-partners the said defendants SYD FINEMAN and MAX GERRICK owned a certain automobile, and propelled and operated

39007

ISAIOKS COOK,
Appellee,

v.

DYD HINEMAN and MAX GERRICK,
Appellants.

2934 I.A. 606

MR. JUSTICE STANLEY DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $3,000 entered upon the verdict of a jury against defendants, Dyd Hineman and Max Gerrick, in an action brought by plaintiff, Isaiokes Cohen, for personal injuries alleged to have been sustained by him while riding as a guest in an automobile driven by defendant Hineman, which automobile crashed into the rear of an automobile owned and driven by one Melvin A. Hansen, who was also made a defendant. The jury returned a separate verdict finding Hansen not guilty and judgment was entered as to him in accordance with said verdict. Plaintiff filed a motion of cross-appeal of the judgment in favor of Hansen, but having failed in his brief to discuss error as to same here, it may be considered as having been abandoned.

The case went to trial upon plaintiff's amended complaint, the pertinent allegations of which, in so far as they concern the defendants, Hineman and Gerrick, are as follows:

"1. That on the 1st day of April, 1934, the defendants DYD HINEMAN and MAX GERRICK were co-partners, trading as HINEMAN and GERRICK.

"2. That as such co-partners the said defendants DYD HINEMAN and MAX GERRICK owned a certain automobile, and possessed and operated

COURT, DOCK DOCKET.
.TERM, 1934 CIRCUIT.

said automobile upon and along a certain public highway, to-wit: Lake Street, at or near to-wit: Mannheim Road, in, at or near Melrose Park, in the State of Illinois.

"3. That the said defendants SYD FINKMAN and MAX GERRICK invited the plaintiff, as a guest, to ride in said automobile, on the date and place aforementioned.

"4. That the defendant MELVIN A. HANSEN, on the date and place aforementioned, owned, propelled and operated another certain automobile.

"5. That on the date and place aforementioned there was in full force and effect certain Statutes pertaining to motor vehicles, which said Statutes are Chapter 95A, Section 22, *** in words and figures as follows:

"(Sec. 22) Every motor vehicle and motor bicycle, while in use on a public highway, shall be provided with good and sufficient brakes, and also with a suitable horn or other signal device, etc.

"***

"6. That it became and was the duty of the said defendants FINKMAN and GERRICK, while the plaintiff was riding as a guest of said defendants, not to wilfully and wantonly injure the plaintiff.

"***

"8. That the defendants and each of them disregarded their duties in that behalf, in that:

"(a) The said defendants SYD FINKMAN and MAX GERRICK caused to and did maintain and operate their said automobile upon and along said public highway aforesaid, in the State of Illinois, by wilfully failing to provide said automobile with good and sufficient brakes, in violation of said Statute, said violation, under the circumstances, constituting wilfull and wanton conduct.

"(b) The said defendants SYD FINKMAN and MAX GERRICK operated

their said automobile upon and along said highway aforementioned with a total indifference to consequences, and disregard for the life, limb and property of others.

"(c) The said defendants SYD FINEMAN and MAX GERRICK wilfully and wantonly operated their said automobile at a high and dangerous rate of speed, and without having a proper care and lookout for other vehicles, in violation of the Statute of Illinois, which said conduct constituted wilful and wanton conduct.

"(d) The said defendants SYD FINEMAN and MAX GERRICK wilfully and wantonly ran into, struck and collided their said automobile, with great force, to, upon and against the vehicle controlled and operated by the other defendant, MELVIN A. HANSEN.

"***

"9. Plaintiff avers that on the date and place aforementioned, while he was riding as a guest of the defendants SYD FINEMAN and MAX GERRICK, and using all due care and caution for his own safety as a direct and proximate result of the negligence, carelessness, and wilfull and wanton conduct of the said defendants and each of them, said automobiles of said defendants were caused to and did run into, strike and collide to, upon and against one another.

"10. That the plaintiff was seriously, dangerously and permanently injured, both internally and externally *** and divers bones of his body were broken and dislocated."

Fineman and Gerrick filed an answer to the amended complaint denying all of the material allegations thereof and averring that said complaint "is insufficient in law in stating a cause of action against these defendants for the reason that it sets forth no duty and no breach of duty by these defendants in the operation of the said automobile."

By leave of court at the close of plaintiff's case, he

their said automobile upon and along said highway aforementioned with a total indifference to human misery, and disregard for the life, limb and property of others.

"(c) The said defendants [illegible] carelessly, wantonly and negligently operated their said automobile at a high and dangerous rate of speed, and without having a proper look-out for other vehicles, in violation of the statute of Illinois, which said statute constituted willful and wanton conduct.

"(d) The said defendants JOE TERRAZ and KARL HENDRICK wilfully and wantonly ran into, struck and collided their said automobile, with great force, so, upon and against the vehicle controlled and operated by the other defendant, KENNETH L. MARCH.

"***

"9. Plaintiff avers that on the date and place aforementioned, while he was riding as a guest of the defendants JOE TERRAZ and KARL HENDRICK, and using all due care and caution for his own safety as a direct and proximate result of the negligence, carelessness, and wilful and wanton conduct of the said defendants and each of them, said automobiles of said defendants were caused to and did run into, strike and collide to, upon and against one another.

"10. That the plaintiff was seriously, dangerously and permanently injured, both internally and externally and divers bones of his body were broken and displaced."

Kinnaman and Derrick filed an answer to the amended complaint denying all of the material allegations thereof and averring that said complaint "is insufficient in law in stating a cause of action against these defendants for the reason that it was [illegible] and no breach of duty by these defendants in the operation of the said automobile."

By leave of court at the close of plaintiff's case, he

filed his second amended complaint consisting of two counts, the first of which is substantially the same as his amended complaint heretofore set forth. The second count contained the following allegations:

"1. Plaintiff avers that on or about to-wit: the 29th day of March, 1934, the defendant MAX GERRICK owned a certain automobile.

"2. That on said date the said defendant MAX GERRICK requested the defendant SYD FINEMAN to drive said automobile from Freeport, Illinois, to Chicago, Illinois, on the 1st day of April, 1934, and that for said purpose the said defendant SYD FINEMAN became and was the servant and agent of the said MAX GERRICK.

"3. That the said defendants SYD FINEMAN and MAX GERRICK and each of them invited the plaintiff as their guest to ride in said automobile, which the said plaintiff accepted, and was a guest of the defendants MAX GERRICK and SYD FINEMAN in said automobile on the 1st day of April, 1934."

The second count then also proceeds with substantially the same averments as the amended complaint.

It was stipulated that the answers filed to the amended complaint stand as answers to the second amended complaint. When reference is hereinafter made to defendants, such reference is intended to apply only to Fineman and Gerrick.

Defendants' first contention is that plaintiff failed to prove any wanton and wilful misconduct on their part and that the trial court should have for that reason sustained their motion for a directed verdict. Plaintiff was a guest in the automobile owned by Gerrick and driven by Fineman. As such guest, under ch. 95a, par. 43 (b) Cahill's 1933 Illinois Revised Statutes, he has no "cause of action for damages against the driver or operator of such motor vehicle or

filed his second amended complaint. Thereafter, the first of which is substantially the same as the amended complaint heretofore set forth. The second count contained the following allegations:

"1. Plaintiff avers that on or about 10-wit: the 20th day of March, 1934, the defendant MAX CHESICK owned a car in Freeport, Illinois, to Chicago, Illinois, on the 1st day of April, 1934, and that for said purpose the said defendant CHESICK became and was the servant and agent of the said ROY FLEMING.

"2. That the said defendants ROY FLEMING and [illegible] and each of them invited the plaintiff as their guest to ride in said automobile, which the said plaintiff accepted, and was a guest of the defendants MAX CHESICK and ROY FLEMING in said automobile on the 1st day of April, 1934."

The second count then also proceeds with substantially the same averments as the amended complaint.

It was stipulated that the answers filed to the amended complaint stand as answers to the second amended complaint. Thereafter, the defendants moved to dismiss, such reference is intended to apply only to Illinois and Section.

Defendants' first contention is that plaintiff's [illegible] court should have for that reason sustained their motion for a directed verdict. Plaintiff was a guest in the automobile owned by Chesick and driven by Fleming. As such guest, under Ch. 95½, par. 58 (a) Smith's 1933 Illinois Revised Statute, he has no "cause of action for damages against the driver or operator of such motor vehicle or

its owner or his employee or agent for injury, death or loss, in case of accident, unless such accident shall have been caused by the wilful and wanton misconduct of the driver or operator of such motor vehicle or its owner or his employee or agent and unless such wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought."

Gerrick, who was associated in business with Fineman's father in Chicago, drove his car to Freeport, Illinois, on a business trip, several days before the occurrence in question, accompanied by the defendant Fineman and his wife. He then drove to Milwaukee, Wisconsin, on business with another man in the latter's car, leaving his own automobile in Freeport. He expected to return to Freeport to drive his own car back to Chicago, but before leaving Freeport for Milwaukee, he authorized Fineman to use the automobile and "I asked him in case I don't get back [to Freeport] to take the car in [to Chicago] for me."

On April 1, 1934, Fineman left Freeport in Gerrick's automobile and proceeded to drive same to Chicago with his wife in the rear seat and plaintiff as a guest passenger in the front seat to his right. When he reached Lake street, which is a four lane highway, he drove East on same and ran into the rear of Hansen's automobile at a point just west of Mannheim road, a north and south public highway that intersects Lake street. Both roadways were paved. It had rained earlier in the day and according to Fineman the pavement was wet. He testified that he drove about twenty-five feet behind Hansen's automobile at a speed of thirty or thirty-five miles an hour for a mile or two before the collision and that he continued to travel at the same speed and at the same distance behind the other car until almost immediately before the impact when Hansen abruptly and without warning applied his brakes and diminished the speed of his car so that he

loss for which the action is brought."

Gentile, who was associated in business with Hineman's father in Chicago, drove his car to Freeport, Illinois, on a business trip, several days before the occurrence in question, accompanied by the defendant Hineman and his wife. He then drove to Milwaukee, Wisconsin, on business with another man in the latter's car, leaving his own automobile in Freeport. He expected to return to Freeport to drive his own car back to Chicago, but before leaving Freeport for Milwaukee, he authorized Hineman to use the automobile and "I asked him in case I don't get back [to Freeport] to take the car in [to Chicago] for me."

On April 1, 1934, Hineman left Freeport in Gentile's automobile and proceeded to drive home to Chicago with his wife in the rear seat and plaintiff as a guest passenger in the front seat to his right. When he reached Lake street, which is a four lane highway, he drove East on same and ran into the rear of Lawson's automobile at a point just west of Kenilworth road, a north and south public highway that intersects Lake street. Both roadways were paved. It had rained earlier in the day and according to Hineman the pavement was wet. He testified that he drove about twenty-five feet behind Lawson's automobile at a speed of thirty or thirty-five miles an hour for a mile or two before the collision and that he continued to travel at the same speed and at the same distance behind the other car until almost immediately before the impact when Hineman abruptly and without warning applied his brakes and diminished the speed of the car so that he

(Fineman), although he applied his brakes and did everything possible to avoid striking the other car, was unable to do so.

Plaintiff, who had turned around to converse with Fineman's wife in the rear seat for a considerable period before the accident, testified that he did not observe what took place at the time of or for sometime prior to the occurrence.

Hansen testified that he drove east on Lake street, at a speed of about thirty-five miles an hour and was going to turn south on Mannheim road; that there were stop signs on all four approaches to the intersection; that there was a warning sign 300 feet west of Mannheim road bearing the legend, "Stop Sign 300 feet"; that as he neared Mannheim road he looked in his rear vision mirror to see if there was anything behind him and saw a car a block or a block and one-half to the west; that he slowed his car down gradually, coming to a complete stop about fifteen feet west of Mannheim road; and that after his car had been stopped fifteen or twenty seconds and while he was waiting to see what the driver of an automobile which had come from the north and stopped just north of Lake street would do, the automobile driven by Fineman crashed into the rear of his car.

Berry Pennington, who was in the automobile that came from the north on Mannheim road, testified that as he approached the intersection, he looked in all directions for traffic and there was none except two automobiles coming from the west on Lake street, the first of which was about the same distance from the crossing as his own car and the second car about 300 yards to the west of the first car (during his examination he also said that the second car was being driven about 100 yards or 300 feet behind Hansen's car); that his car from the north and Hansen's car from the west reached the intersection and stopped at about the same time and that while they were "sort of jockeying a little bit as to who should take the right of

way *** there was a crash and I saw this other car that had been coming from the west, that I had dismissed from my attention completely, had crashed into the back end of the other car which was stopped at the intersection, and when they collided, when he bumped this other car, he pushed him completely across the road and turned around, so that instead of being headed east as he was he was headed west."

John W. Daska testified that he was employed at a fruit stand at the southeast corner of the intersection; that there were stop signs at all four corners; that he saw the Hansen car stop just west of Mannheim road and the Pennington car stop just north of Lake street; that at about the same time he first saw defendants' automobile about twenty-five or fifty feet west of the Hansen car approaching at a speed of about thirty-five miles an hour; that it was swaying and skidding; that the pavement was wet and he saw skid marks from this car about ten or fifteen feet in length after the accident; and that after the collision Hansen's automobile was in the southeast portion of the intersection "facing northwest".

There might be some question whether this evidence alone was sufficient proof of the wilful and wanton misconduct charged, but this is not all the evidence bearing on the charge of wilful and wanton misconduct on the part of the defendants. Fineman also testified that while he did not notice the stop or warning signs as he approached Mannheim road, he knew that said highway was a "regular stop street;" that "he [Hansen] seemed like he was going right ahead;" that "by the rate of speed, he [Hansen] did not look as if he was going to stop;" that since it appeared to him that Hansen did not intend to stop at all at Mannheim road "I intended to follow him" right through regardless of traffic that was going "north and south". This testimony of Fineman that he knew that Mannheim road was a "regular stop street," that he thought Hansen was going to drive right across same

way *** there was a crash and I saw the other car[that] had been coming from the west, that I had cleared from by nineteen completely, had crashed into the back end of the other car which was stopped at the intersection, and when they collided, when he passed this other car, he pushed him completely across the road and crashed around, so that instead of being headed east in he was headed west."

John K. Hanks testified that he was employed at a fruit stand at the southwest corner of the intersection; that there were stop signs at all four corners; that he saw the Hansen car stop just north of Mannheim road and the Pennington car stop just north of Lake street; that at about the same time he first saw defendants' automobile about twenty-five or fifty feet west of the Hansen car approaching at a speed of about thirty-five miles an hour; that it was raining and skidding; that the pavement was wet and he saw skid marks from the car about ten or fifteen feet in length after the accident; and that after the collision Hansen's automobile was in the southwest portion of the intersection "facing northeast".

There might be some question whether this evidence alone was sufficient proof of the wilful and wanton misconduct charged, but there is not all the evidence bearing on the charge of wilful and wanton misconduct on the part of the defendants. Hansen also testified that while he did not notice the stop or warning signs as he approached Mannheim road, he knew that said highway was a "through stop street;" that "he [Hansen] seemed like he was going right ahead;" that "by the rate of speed, he [Hansen] did not look as if he was going to stop;" that since it appeared to him that Hansen did not intend to stop at all at Mannheim road I intended to follow him right through regardless of traffic that was going "north and south". Then testimony of Hansen that he knew that Mannheim road was a "through stop street," that he thought Hansen was going to make right across

without stopping and that he intended to follow him right through regardless of traffic and the stop signs, considered with all the other evidence in the case, was ample justification for the verdict of the jury finding defendants guilty of wilful and wanton misconduct that was the proximate cause of plaintiff's injuries. By his conduct and declared intention Fineman evinced a reckless disregard of the rights and safety of plaintiff. The facts in the instant case bring Fineman's operation of the automobile squarely within the definition of wilful and wanton misconduct enunciated in Jeneary v. C. & I. Traction Co., 306 Ill. 392, cited by defendants, where the court said at pp. 397, 398: "Ill-will is not a necessary element of a wanton act. To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care with the consequences of a willful injury. (Walldren Express Co. v. Krug, 291 Ill. 472; Bernier v. Illinois Central Railroad Co., 296 id. 464.)" The court therefore properly refused to direct a verdict for defendants on the ground that plaintiff failed to prove that they were guilty of wilful and wanton misconduct.

Defendants next insist that a verdict should have been directed for them because plaintiff failed to prove that Fineman drove the automobile as the agent and servant of Gerrick as alleged in the second count of the second amended complaint. It is sought

to support this contention by the glaring misstatement in defendants' brief that "plaintiff's proof on the question of this agency was merely the fact that the defendant, Syd Fineman, was driving the car at the time of the occurrence complained of. He did not actually prove the ownership of the car by the other defendant, Max Gerrish." This statement is absolutely refuted by the testimony of the defendants themselves, and it is sufficient answer to the instant contention that Gerrick testified, that "the car that figured in the accident was mine"; that "I authorized Syd Fineman to use it"; and that "I asked him in case I don't get back [to Freeport] to take the car in [to Chicago] for me."

It is claimed that the verdict is excessive. The evidence disclosed that as a result of the accident plaintiff received lacerations on the forehead and upper lip, which had to be sutured, and contusions on various parts of his body. He suffered a skull fracture and injury to his brain, which affected his eardrum and one of his eyes. There was evidence that plaintiff suffered from dizziness and headaches almost continuously since he was injured. His doctor's bill was $250. In our opinion, considering the nature and extent of plaintiff's injuries, as well as the other proper elements of damage, the amount of damages awarded by the jury was not excessive.

Complaint is made that the trial court erred in permitting a medical expert to answer the hypothetical question propounded to him by plaintiff's counsel. The question assumed to state the material and qualifying facts in evidence and concluded with the inquiry, "Have you an opinion, Doctor, based upon a reasonable degree of medical certainty, as to whether or not the accident in question, with the symptoms following, might cause or bring about the headaches that the hypothetical person is now complaining about?" Defendants' counsel stated his objection to the question as follows: "The objection is

that the question ends up by whether or not those things might cause it. That isn't the rule of proof here. The rule of proof is that the injuries do cause it, with a reasonable degree of medical certainty, not that they might cause it." The form of the inquiry with which the hypothetical question concluded was approved in Kimbrough v. Chicago City Railway Company, 272 Ill. 71, where the court said at pp. 77, 78: "A physician may be asked whether the facts stated in a hypothetical question are sufficient, from a medical or surgical point of view, to cause and bring about a certain condition or malady, or he may be asked whether or not a given condition or malady of a person may or could result from and be caused by the facts stated in the hypothetical question, but he should not be asked whether or not such facts did cause and bring about such condition or malady. (Illinois Central Railroad Co. v. Smith, 208 Ill. 608; Keefe v. Armour & Co., 258 id. 28; People v. Schultz, 260 id. 35; Castaine v. United Railways Co., 249 Mo. 195; 155 S. W. Rep. 38; Sever v. M. & St. Louis Railroad Co., 156 Iowa 664; 137 N. W. Rep. 937; 44 L. R. A. [N.S.] 1200.) In cases where there is no dispute as to the manner and cause of the injury and no dispute that there was an injury sustained by reason of the acts of which complaint is made, this court has held that a physician may then directly testify that a later malady was or was not caused by the accident or original injury, upon the same principle that he may testify that death resulted from a certain wound. Schlauder v. Chicago and Southern Traction Co., 253 Ill. 154; City of Chicago v. Didier, 227 id. 571." It is also stated that the hopothetical question ignored certain facts in evidence and misstated others. No such objection was raised in the trial court and it is too late to urge it at this time. In any event it was the duty of defendants' counsel by specific objection to direct the court's attention to facts

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hypothetical question, but he should not be asked whether or not such
facts did cause and bring about such condition or malady." Illinois
Central Railroad Co. v. Smith, 209 Ill. 658; Keefe v. Chicago & C.,
288 id. 28; Peoples v. Chalifs, 260 id. 48; Christine v. United Rail-
ways Co., 249 Mo. 188; 153 S. W. Rep. 38; Lewis v. M. & St. Louis
Railroad Co., 186 Iowa 664; 137 N. W. Rep. 827; 44 L. R. A. (N.S.)
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Chicago v. Hellman, 227 id. 271." It is also stated that the hypothe-
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No such objection was raised in the trial court and it is too late to
make it at this time. In any event it was the duty of defendants,
counsel by specific objection to direct the plaintiff's attention to it.

omitted from or misstated in the hypothetical question or to call the attention of the witness to such facts on cross-examination. (Chicago City Railway Company v. Bundy, 210 Ill. 39.) We do not think there is any valid ground for the objection to the hypothetical question.

It is next contended that six instructions given at plaintiff's instance were erroneous. We have carefully examined and considered all of the instructions given to the jury and are satisfied that, notwithstanding that some of them may have been inaptly drawn, taken as a series, they fairly state the rules of law applicable to the proven facts in this case. "There was no proposition of law pertinent to the issues of the case on which the jury were not fully instructed. The office of instructions is to give information to the jury concerning the law of the case for immediate application to the subject matter before them. The test, then, is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions." Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207. "All the instructions given by the court, taken together, constituted a single charge to the jury. Error cannot be predicated upon such a charge by the selection of particular sentences or paragraphs and reading them separated from other portions of the charge which modify and express them." People v. Bundy, 324 Ill. 190.

Defendants' contention that their motion in arrest of judgment should have been sustained because plaintiff's complaint did not state a cause of action against them is without merit. "No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet." (Ch. 110, par. 170,

omitted from or misstated in the hypothetical question or to call the attention of the attorney to such facts on cross-examination. (Chicago City Railway Company v. Tuohy, 210 Ill. 39.) We do not think there is any valid ground for the objection to the hypothetical question.

It is next contended that six instructions given at the plaintiff's instance were erroneous. We have carefully examined and considered all of the instructions given to the jury and are satisfied that, notwithstanding that some of them may have been somewhat inaptly drawn, taken as a series, they fairly state the rules of law applicable to the proven facts in this case. There was no proposition of law pertinent to the issues of the case on which the jury were not fully instructed. The office of instructions is to give information to the jury concerning the law of the case for immediate application to the subject matter before them. The test, then, is not what meaning the ingenuity or counsel can at leisure extract from the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions. Indiana v. Chicago Rapid Transit Co., 247 Ill. 209. "All the instructions given by the court, taken together, constituted a single charge to the jury. Error cannot be predicated upon such a charge by the rejection of particular sentences or paragraphs and reading them separately from other portions of the charge which modify and explain them." Tuohy v. Tuohy, 234 Ill. 180.

Defendants' contention that their motion to arrest or judgment should have been sustained because plaintiff's complaint did not state a cause of action against them is without merit. The question should be decided on the pleadings which should contain such information as will reasonably inform the opposite party of the nature of the claim or defense which he will be called upon to meet. (Gm. 178, Del. 174,

sec. 42, subsec. 2, Illinois State Bar Stats. 1935.) It cannot be said that plaintiff's complaint heretofore set forth did not reasonably inform defendants of the nature of plaintiff's claim.

For the reasons stated herein the judgment of the Circuit court for $2,000 in favor of plaintiff and against defendants Syd Fineman and Max Gerrich and the judgment against plaintiff in favor of defendant Melvin A. Hansen are affirmed.

JUDGMENTS AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

39625

MARGARET FENDI,

(Plaintiff) Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

294 I.A. 606

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant company from a judgment entered on the verdict of a jury in favor of the plaintiff in the sum of $1,000.

The suit by the plaintiff was instituted on a policy of insurance issued by the defendant company on the life of John Fendi, in which the plaintiff is the named beneficiary.

Plaintiff alleges the issuance of the policy dated April 20, 1933, and the death of John Fendi on September 19, 1935. Plaintiff further alleges in the complaint that notice of death was given to the defendant in the manner and form as provided for by the terms of the policy, and the refusal of the defendant company to pay the amount provided for in the policy.

The answer of the defendant admits the issuance of the policy on April 20, 1933, and alleges that the policy was issued in consideration of the application and the payment of the quarter-annual premiums on the 20th day of July, October, January and April of each year. The policy lapsed for non-payment of the quarter annual premium due January 20, 1935. On February 28, 1935, John Fendi signed an application for reinstatement and therein, as averred in the answer of the defendant, represented to this defendant company that he was in sound health, that he had no illness or injury since the date of the issuance of the policy, had consulted no physicians, and in the application for reinstatement which was signed by him, he admitted the lapse of the policy and certified

(Indorsement) Complaint.

DOHERTY, a corporation,

Plaintiff,

vs.

(Plaintiff) Appellee,

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant) Appellant.

No. 5971-Y. Filed in the Circuit Court of Cook County.

Cook County.

Circuit Court.

Appeal from

No. 5971-Y.

Doherty

vs.

Metropolitan Life Insurance Company.

Complaint.

Filed

Clerk.

Deputy.

Appellee's Attorneys.

Appellant's Attorneys.

Appeal from Circuit Court of Cook County.

Filed

Clerk.

Deputy.

Appellee's Attorneys.

Appellant's Attorneys.

Appeal from Circuit Court of Cook County.

Filed

Clerk.

Deputy.

Appellee's Attorneys.

Appellant's Attorneys.

that his answers were true and correct and were made to induce the Metropolitan Life Insurance Company to reinstate the policy, that if the policy were reinstated, it would be deemed to be based upon the representations contained in the application and upon the express condition that if the statements therein were in any respect untrue, the company would, for a period of two years from the date of reinstatement, be under no liability by reason of the attempted reinstatement of the policy, except that the company would return to the insured or his personal representative all premiums paid since the date of said reinstatement.

Defendant in its answer further alleges that by reason of said representations, the policy was reinstated, that John Fendi was not in sound health on February 28, 1935, that he had since April 20, 1933, the date of the policy, had an illness: syphilis; that he had consulted Dr. Fox on January 2, 1935, and Dr. Vertuno in January, 1935; that the insured died of syphilis on September 19, 1935; that had the defendant known the true answers to said questions on February 28, 1935, it would not have reinstated said policy; that the defendant has tendered and again tenders the sum of $30.06, the premiums paid since the application for reinstatement. Defendant denies that there is any liability to the plaintiff for any further amount and denies the plaintiff is entitled to recover.

To this answer the plaintiff filed a reply in which she admits signing the application for reinstatement, and denies that John Fendi made any false and untrue answers therein. Plaintiff further denies that John Fendi was not in sound health on February 28, 1935, and alleged that he was to the best of his knowledge and belief in sound health on that date, and the plaintiff further alleges in the alternative that either he did not have

syphilis or that he did not consult Dr. Fox or anyone else on January 2, 1935, or at any other time, and denies that he consulted Dr. Vertuno in January, 1935 for syphilis; denies that the cause of his death was syphilis; or that the answers were not made in good faith and with any intent to deceive or defraud the defendant; denies that he answered the questions as alleged in defendant's answer, but alleges that he could neither read nor write the English language except to sign his name and the false answers recorded were incorrectly recorded by the defendant's agent; and that Fendi gave true answers. The reply further states that no copy of the application for reinstatement was attached to the policy, and alleges that the policy was incontestable.

From the facts in evidence the defendant company issued its policy in the sum of $1,000 to John Fendi on April 20, 1933. The policy required the payment of quarterly premiums of $10.02 each on the 20th day of July, October, January and April of each year to keep it in force. The premium which was due on January 20, 1935 was not paid and John Fendi applied for the reinstatement of this policy on February 28, 1935. In the application for reinstatement signed by him it is claimed he represented he was a car repairer for the Northwestern Railroad; that he was in sound health; that he had not consulted any physician since the issuance of the policy, or suffered any illness or injury.

There is evidence that John Fendi consulted Dr. Nicholas L. Fox on January 10, 1935, and that Dr. Fox made a complete physical examination and his diagnosis was cerebral spinal syphilis or lues.

There is also evidence in the record that Dr. L. Abbott Vertuno testified he saw John Fendi for the first time on February 24, 1935, that he advised him to go to a hospital for a urinalysis

on February 25, 1935; that at the time he consulted the doctor the plaintiff was with him; that Dr. George DeTrana testified that the first time he saw John Fendi was in June, 1935, at his office, which was after application for reinstatement had been filed by the insured; that he saw him many times; that he was admitted to the St. Anne's Hospital; that he made an examination and from the history Fendi gave him, it appeared that the insured had been to one or two other hospitals, and had been discharged from the Cook County Hospital as a patient; that Dr. DeTrana diagnosed his condition as syphilis, and that it was present in February, 1935.

The plaintiff testified that the insured was in the Mercy Hospital for five or six days in January, 1935, and that he died on September 19, 1935.

There is evidence to the effect that Dr. E. W. Marquardt testified that he saw the insured in August, 1935, which was after the date of the application for reinstatement, and diagnosed the case as syphilis; that in making application for reinstatement of the policy on behalf of the assured plaintiff's evidence shows that she went to the office of the defendant company, which was on the second floor of the building located in Elmhurst, Illinois, and tendered the premium for $10.02 in payment of the amount due on the policy, and the clerk asked for the insured and the plaintiff testified she said he was downstairs and the clerk told her to have him come upstairs into the office and sign some papers; that she brought her husband upstairs and he signed them. Plaintiff further testified she could not read or write and that nothing was read to the assured in her presence, and denied that any questions were asked him. She also testified that she was with her husband in Dr. Fox's office and that her husband was in the Mercy Hospital for five or six days in January, 1935.

The policy of insurance, the subject of this litigation,

was issued on April 20, 1933, and contains among its provisions the following clause:

> "3. INCONTESTABILITY: This policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for non-payment of premiums, and except as to provisions and conditions relating to benefits in the event of total and permanent disability, and those granting additional insurance specifically against death by accident, contained in any supplementary contract attached to, and made part of, this Policy."

The date of death of the assured was September 19, 1935, being more than two years after the date of issuance of the policy. While it is not disputed that the assured consulted the physicians named in defendant's statement of facts, it appears that Dr. Fox and Dr. Vertuno were consulted prior to February 28, 1935, when the application for reinstatement was made.

The plaintiff contends that in order to void a policy of insurance on the ground of fraud, the answers must not only be untrue, but they must have been made with reference to a material matter and must have been intentionally false, and further contends that it is presumable inference from the evidence in this case that the insured in answering as he did acted in good faith without intent to deceive or defraud, and consequently a presumption may be indulged that he acted in good faith since "fraud is never to be presumed but must be established by convincing proof and by the greater weight of the evidence." Byerly v. Byerly, 363 Ill. 517.

The defendant contends that plaintiff's answers to the questions were deliberate misrepresentations and not made in good faith because, whether he was educated or not, he certainly knew he had consulted these doctors shortly before the date of the application for reinstatement; that these misrepresentations are not in the category of constructive fraud. It does appear there is evidence in the record that at the time the insured appeared at the office of the defendant company in Elmhurst, Illinois, a young

was issued on April 30, 1943, containing among its provisions the following clause:

"3. Impracticability: This policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for non-payment of premium, and except as to provisions and conditions relating to benefits in the event of total and permanent disability, and those granting additional insurance specifically against death by accident, contained in any supplementary contract attached to, and made part of, this policy."

The date of death of the insured was December 13, 1951, being more than two years after the date of issuance of the policy. While it is not disputed that the insured committed the deliberate misstatement of fact, it appears that in the application for reinstatement; that those statements can not be in the category of constructive fraud. It does appear there was no knowledge on the part of the applicant that these statements were not true. Questions were deliberate misrepresentations and not mere innocent mistakes. Whether he was educated or not, he certainly knew he had committed these perjuries shortly before the date of the application for reinstatement. Under the circumstances the insurance company is estopped to deny coverage.

The defendant contends that plaintiff's recourse to the insured in connection with plaintiff's recourse to the greater weight of the evidence." Smith v. Cassity, 181 Ill. App. 1913. The defendant contends that plaintiff is barred by the statute of limitations. Section 46 of the Insurance Code provides that no action at law or in equity shall be brought after the expiration of three years from the time the cause of action accrued, except that if at the time the cause of action accrued the person entitled thereto is a minor, or under legal disability, then he may bring his action within the time limited in this section after the removal of such disability, or after death, whichever event first occurs. Ill. Rev. Stat. 1951, Ch. 73, Par. 658. The plaintiff contends that the statute of limitations began to run on the date of the death of the insured, December 13, 1951, and that the action was brought within the time limited by the statute. The defendant contends that the statute began to run on the date of the issuance of the policy, April 30, 1943, and that the action was brought more than two years after the cause of action accrued, and is therefore barred by the statute of limitations. The plaintiff contends that the statute of limitations began to run on the date of the death of the insured, December 13, 1951, and that the action was brought within the time limited by the statute. The defendant contends that the statute began to run on the date of the issuance of the policy, April 30, 1943, and that the action was brought more than two years after the cause of action accrued, and is therefore barred by the statute of limitations.

woman cashier asked the plaintiff to sign a paper, which no doubt was the application for reinstatement, but that no questions were asked or any answers given by the insured in the presence of the plaintiff, who appeared at the office with the insured at the time the application for reinstatement was made. While these facts were contradicted by the young woman cashier, they were questions of fact for the jury to pass upon, and no doubt this was one of the elements considered by the jury in determining the question of whether the representations were made as they appear from the application for reinstatement.

The defendant calls our attention to the plaintiff's contention that the incontestable clause in the policy precludes any contest on the ground of fraud after two years from the date of issuance and that the policy was more than two years old at the time of the death of Fendi, and then points to the fact that the trial court admitted the application for reinstatement in evidence, and also admitted evidence to show the misrepresentations of facts made by insured in said application, and that the question as to whether the policy was incontestable or not was determined by the trial court adversely to the contention of the plaintiff. Defendant then makes this suggestion: that in order to raise this question it was necessary for the plaintiff to assign cross errors. While it is true that the question as to whether the application for reinstatement contained false answers was submitted to the jury, that was the defense urged by the defendant and having offered such defense, the defendant is bound. The verdict of the jury finding the defendant guilty, and upon which this judgment was entered, does not require the plaintiff to assign cross errors for the purpose of having the court pass upon the question of whether the court erred in permitting such defense. The plaintiff having recovered a judgment for the amount claimed in her statement of

claim, it was not necessary for her to assign errors.

In passing upon the next question as to whether the insured was properly reinstated after the alleged default in the payment of premiums by the insured, the clause of the policy to which we have referred in this opinion provides that the policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for non-payment of premiums. Although the premiums were not paid, the Insurance Company accepted the premium at the time the policy was reinstated. There were no restrictions upon the company's determination of what it should deem evidence of insurability at the time of reinstatement. Having accepted as satisfactory the statement of the insured, the company waived the right of forfeiture. The defendant has cited a number of authorities from other jurisdictions upon the question of its rights where the policy is in default and contains an incontestable clause, which authorities are to the effect that the company is not deprived of the right to contest after default on the ground of fraud in the application for reinstatement after two years from the date of the issuance of the policy. We believe the case of Murphy v. Old Colony Life Insurance Company, 219 Ill. App. 649, an unpublished opinion, is apt in passing upon the very question involved in this proceeding. It was held by this court as follows:

> "This is an action brought on an insurance policy issued by defendant company. It electing to stand by its affidavit of merits and appealing from the judgment entered as in case of default, the question presented is as to the sufficiency of the defense, which is, in substance, that the policy having lapsed for failure of insured to pay a premium and having been reinstated on his application containing false and untrue representations, knowingly made by him, that he was in good health and free from physical ailment, the reinstatement was null and void. The policy contained clauses conforming to the statute making it incontestable two years after its date, and in the event of default in premium payments, giving the right to reinstatement upon evidence of the insurability at the time of reinstatement 'satisfactory to the company,' etc. (pars. 3 and 9, Sec. 6513, Jones & Addington Stats.).
>
> The policy was issued in 1909, the default and reinstatement

on compliance with conditions required, were in July, 1915, death of the insured occurred in December, 1916, and the suit was brought in June, 1917.

It is appellant's contention that it may avoid the effect of reinstatement made upon such false representations within the period of two years thereafter. In other words, that the period of contestability runs anew from the date of reinstatement, especially where the reinstatement was induced by fraud.

In support of its position cases are cited from other jurisdictions, like Tester v. United Life Ass'n, 169 N. Y. 411, and those following it holding that the period of limitation for contest commences anew upon the reinstatement of the policy, on the theory that the reinstatement is a new contract of insurance, and cases like State Mutual Life Ins. Co. v. Rosenberry (Tex.), 213 S. W. 243, holding that while the contract for reinstatement is to be regarded not as a new contract but as a waiver of forfeiture, it reserves the right to avoid the reinstatement if induced by fraudulent means.

The rule followed in Monahan v. Fidelity Life Ins. Co. 242 Ill. 488, is that a reinstatement is merely a cancellation of the forfeiture, and that the original policy continues in full force without interruption. In that case while the death of the insured was less than two years after the reinstatement of the policy it was more than two years after its issuance, and the policy was accordingly held incontestable. Reviewing conflicting authorities on the subject the Court declined to follow the rule announced in the Tester and other cases relied on by appellant, and adopted the rule of other cases referred to therein to the effect that the contract to which the limitation is applicable is that of the original application and policy, and not the reinstated one. This is in consonance with the statute which makes the policy and application therefor the entire contract between the parties. While fraud was not the defense in the Monahan case, what was said of the contract and contestability is applicable to the facts here and justified the Court below in striking the affidavit on the ground that misrepresentation in the application for reinstatement is not part of the contract between the parties which by the terms of the statute as well as the policy is made 'incontestable after two years from its date,' except for specified grounds not involved here and that do not include fraud. We need not, however, discuss authorities of other jurisdictions.

Furthermore, as the statute puts no restrictions upon the company's determination of what it shall deem statutory evidence of insurability at the time of reinstatement, the company would hardly seem to be in a position to question the waiver of forfeiture so long as it chose to accept as satisfactory the mere statement of the insured with regard to his health without taking other precautions such as are usually observed with regard to insurability before issuing a policy. However, it is unnecessary to decide this question if the insurer is precluded from making any defense after the lapse of two years from issuance of the policy other than those defenses named in the statute, viz., non-payment of premiums and violation of the conditions of the policy relating to military or naval service in time of war."

A certiorari to review the foregoing opinion was denied by the Supreme Court of Illinois.

The same reasoning as appears in the opinion we have just quoted is applicable to the pending litigation, which is in effect that the defendant company on the one hand is not in a position to question the waiver of forfeiture when it accepts as satisfactory the statement of the insured and the answers required in regard to his health where the company fails to adopt other precautions such as are usually adopted with regard to insurability before issuing a policy.

It is to be noted from this opinion that this court did not follow the conflicting authorities cited by the parties to the litigation, but adopted the rule that the contract to which the limitation is applicable is that of the original application and policy, and not the reinstated one. In other words, the reinstatement is a cancellation of the forfeiture and the original policy continues in full force and effect without interruption.

The reply of the defendant insurance company, as to the effect of this authority, is that the Supreme Court held in Keller v. North American Life Insurance Company, 301 Ill. 198, that the rule announced in the Monahan case was not applicable. The question in the Keller case is was the premium paid when the insured issued a promissory note and made a small cash payment to the Insurance Company. The acceptance of said note was conditional payment, and this appears from the language used by the court in that case. The defendant company admits that a reinstatement restores the policy, yet urges that the reinstatement does not restore the parties to the same status they occupied prior to the default; that the parties occupy a changed status created by the new application and their status must be measured by the rights and

A *mortgage* is rather the interesting situation one landed by
the Supreme Court at Illinois.

The case resembles as much as in the opinion as does that
dwarf is objectionable as the penalty litigation, which is in effect
that the defendant consents on the car card it may in a position to
question the subject of interaction when it accepts an unlicensed
the statement of the insured and the company maintains in order to
pay benefit where the company fails to state other circumstance mere
as any penalty applies also relies of immediately before insured
a policy.

It is to be noted that this opinion that this cause was
not inflow the conflicting circumstances mixed in the decision to
the litigation, but stated the main that the decision be noted
the litigation is applicable to that if the original application
and policy, and not the misstatement. In other words, the
retort because is a cancellation of the forfeiture and the original
policy continues in full force as after breach insurance.

The result of the majority conclusion seemed, as we can
effect it does subsist. In this the opinion Court said in
Bailey v. Early Insurance Co. of Chicago, 201 Ill. 139,
that the rule announced in the Illinois case was not applicable.
The question in the Bailey case is not the question will when the
insured intend a mortgage more recent i until cause because as
the Insurance Company. The statutes plainly note was qualified
by *law*, and this adopts also the insurable mean of the result in
that case. The statutory security right but i determinement
restore the policy, and under that the relationship does and
defeat; that the mortgage remain a conflict matter be the new
application and their subject should be received by the

obligations of the new contract as well as by the old.

In this case the company accepted the premium and the policy was reinstated and, under its terms, was in full force and effect. A new contract between the parties was not entered into due to the fact of the reinstatement. By the acceptance of the application for reinstatement and the premium, the company waived the right of forfeiture, and therefore the contract between the parties occupied the same status as it occupied prior to the default.

We have already pointed to the fact that the Supreme Court of this state declined to review the opinion filed in the case of Murphy v. Old Colony Life Insurance Co., 219 Ill. App. 649. The Supreme Court, in effect, approved what was said in the opinion filed by this court.

It is contended that the court erred in refusing to admit in evidence the proof of death signed and filed by the plaintiff in this case. While it is true that the court should have permitted the proof of death to have been received in evidence and considered by the jury, still the question arises; was it such error as would justify a reversal of the judgment. Dr. Fox, a witness, testified as to the examination and condition of the insured's health, and nothing could have been added to what he testified by admitting the proof of death signed by the doctor. There was also, as a part of the certificate, the statement of the plaintiff. There was really no dispute as to the condition of the health of the insured, nor as to the disease with which he was afflicted, and the court in passing upon the question as to the admissibility of these documents said:

> "I do not think it material what he died of in this case; there is no dispute - the man had syphilis. The only question involved here is whether he knew about it or that there was such a condition on his part as to put him on notice that he had it."

applications of the new statutes as well as of the old.

In this case the learned counsel the question and the judge
[illegible]
[illegible]
[illegible]

Where this evidence is in the record as to the affliction from which he was suffering, it would not seem that the refusal to admit the proof of death was error such as would justify a reversal of the judgment on that ground.

This cause was submitted to a jury who considered the evidence and was instructed by the court relative to the law applicable to the questions in controversy. No contention is made by the defendant that the court erred in refusing to give instructions or to modify any of the instructions offered by the defendant, and no questions having been raised, we have a right to assume that the defendant was satisfied with the instructions given to the jury upon the questions involved.

There being no further material question to be considered we are of the opinion that the judgment should be affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39659

JULIUS F. SMIETANKA, Trustee, etc.,

(Plaintiff) Appellant,

v.

ROSE MIKALAUSKAS, et al., MAY C. HALL, Intervening Petitioner and Cross-Complainant, et al.,

(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

294 I.A. 606[3]

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

On October 6, 1933, the plaintiff as trustee filed a bill to foreclose a trust deed which was executed by Rose Mikalauskas, et al., defendants. To this bill appearances and answers were filed and the cause referred to a master in chancery to take testimony therein and report the same to the court, together with the master's conclusions of law and fact. During the pendency of the proceeding May C. Hall filed her intervening petition and cross-complaint by leave of court first had and obtained. The plaintiff filed a motion to dismiss the intervening petition and cross complaint of May C. Hall, which motion was denied by the court. From this order the plaintiff appeals.

The bill of complaint to foreclose the trust deed dated April 25, 1929, was filed by Julius F. Smietanka, plaintiff, the trustee designated in the trust deed as trustee for the use and benefit of all the noteholders, on October 6, 1933. The trust deed secured the payment of the principal sum of $26,500, represented by 27 principal notes of varying dates of maturity. All of the principal notes were secured by the trust deed given to secure the payment of the several notes, and the trust deed further provided that if default be made in the payment of any one of the installments of interest when the same became due and payable, then at the election of the legal holder or holders thereof, the principal sum, together with accrued interest thereon should become due and payable, said

(Plaintiff) Appellant,

v.

(Defendant) Appellee.

Complainant, et al.,
Intervening Petitioner and Cross-

Cross Complainants, et al., Appellants,

Appeal from

Circuit Court

APPEAL FROM THE CIRCUIT COURT OF LAKE COUNTY.

On October 5, 1927, the plaintiff as trustee filed a bill to foreclose a trust deed which was executed by Jane Hutchinson et al., defendants. To this bill counterclaims and pleadings were filed and the cause referred to a master in chancery to take testimony thereon and report the same to the court, together with the master's conclusions of law and fact. During the pendency of the proceeding one C. Bell filed her intervening petition and cross-complaint by leave of court first had and obtained. The plaintiff filed a motion to dismiss the intervening petition and cross complaint of May 5, 1931, which motion was denied by the court. From this order the plaintiff appeals.

The bill of complaint to foreclose the trust deed dated April 25, 1925, was filed by Julius F. Hutchinson, plaintiff, the trustee designated in the trust deed to succeed the one who died on October 5, 1926. The trust deed secured the payment of the principal sum of $10,000, represented by 20 principal notes of varying dates of maturity. All of the principal notes were executed by the first deed given to secure the payment of the several notes, and the first deed further provided that it default be made in the payment of any one of the installments of interest when the same become due and payable, then at the election of the legal holder or holders thereof, the principal sum, together

election to be made at any time after the expiration of 30 days, without notice. To secure the payment of said principal notes and interest, Rose Mikalauskas, who was then and there the owner of certain real estate, executed the trust deed in question, and conveyed the premises together with the rents, issues and profits to the plaintiff, as trustee.

It is further charged in the bill of complaint that various defaults were made in the payment of principal and interest, and that such defaults continued for a period of more than 30 days from their respective dates, and that by reason of such defaults a majority of the holders and owners of the notes did elect to declare the principal due thereon, and did request the plaintiff as trustee under said trust deed, to bring foreclosure proceedings in accordance with the terms and conditions of said trust deed; that subsequently, on February 23, 1937, May O. Hall filed an intervening petition and cross-complaint setting forth that the only parties to the suit involved in this proceeding were the owners of the equity, the tenants and the Recorder of Deeds of Cook County, and setting forth that she was on October 16, 1933, the owner of certain of the notes in the total sum of $10,000, with interest coupons attached thereto, and also was in possession of the mortgagee's duplicate trust deed and the mortgagee's duplicate certificate of title, and that they were held by the petitioner and cross-complainant for her own use and benefit and for the use and benefit of all of the other owners and holders of notes secured by the trust deed.

The plaintiff filed a motion to dismiss the intervening petition and cross-complaint of May O. Hall on the ground that the plaintiff as trustee had the exclusive right to foreclose the trust deed herein, which trust deed provides:

"It is agreed by the grantor that in case of a right of foreclosure, or other right of procedure shall arise hereunder, either upon maturity of said principal note or by breach of any of the covenants herein, as aforesaid, the said Trustee (Julius F. Smietanka) shall, upon request of the legal holder of said principal note, bring such legal or equitable proceedings for the collection of the moneys hereby secured as may be necessary."

Upon a hearing of said motion of the plaintiff to dismiss the intervening petition and cross-complaint of May C. Hall, it was ordered that said motion to dismiss be and the same is denied and that the plaintiff be required to answer the intervening petition and cross-complaint.

From the record the question is: Was the order which determined the issues between the parties a final one? The motion presented to the court and upon which the order was entered was to dismiss the intervening petition of the intervenor, May C. Hall, and after due consideration the court denied plaintiff's motion and required him to answer the intervening petition, so from this order it is apparent that the rights of the parties were not finally disposed of, but rather that the motion entered was a denial of the request of the plaintiff to dismiss the intervening petition, and that judgment was not entered disposing of the rights of the several parties. This not being a final order in the sense that the questions involved were passed upon by the trial court, the case is not properly in this court.

The motion presented to the trial court was a motion to dismiss the intervening petition and was in the nature of a demurrer, which was allowed under the old Practice Act. A motion of this character is governed by Ch. 110, Ill. Rev. Stats. 1937, sec. 45, par. 169, sub-division (1), which provides in part as follows:

> "All objections to pleadings heretofore raised by demurrer shall be raised by motion. Such motion shall point out specifically the defects complained of, and shall ask for such relief as the nature of the defects may make appropriate, such as the dismissal of the action or the entry of a judgment where a pleading is substantially insufficient in law, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth."

The order, as we have heretofore indicated in this cause, was to the effect that the motion be denied and the plaintiff required to answer.

For the reasons stated in this opinion, the appeal is not properly in this court, and is dismissed.

APPEAL DISMISSED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39669

DR. LOUIS E. SCHMIDT,

Plaintiff-Appellee,

v.

FRED D. MICHAEL, also known as FREDERICK DALTON and FREDERICK DALTON MICHAEL,

Defendant-Appellant,

THE NORTHERN TRUST COMPANY,

Garnishee-Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO COOK COUNTY ILLINOIS.

294 I.A. 606

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in the Municipal Court of Chicago, Cook County, Illinois, in the sum of $1,297.38. The action was heard before the court on a contract, attachment and garnishment proceeding. In the garnishment proceeding the Northern Trust Company was named as garnishee. The plaintiff instituted suit for professional services alleged to have been rendered by him to the defendant in an alleged sum of $500 and also on claims by the plaintiff as assignee of a non-negotiable choses in action for services alleged to have been rendered to the defendant by Dr. Clarence Bernstein, Dr. Joseph L. Miller and Kathryn Graf, being in the sum of $797.38.

Defendant's motion for a new trial and in arrest of judgment was overruled, and upon notice of appeal the case is now in this court.

Plaintiff's original statement of claim was filed on the 3rd day of December, 1936, from which it appears that the plaintiff's claim is for medical services and as assignee under the terms of certain assignments executed by Dr. Clarence Bernstein, Dr. Joseph L. Miller and Dr. Kathryn Graf, and that he seeks to recover the sum of $1,362.25, by virtue of said alleged services rendered by the plaintiff, together with those rendered by the assignors for and on behalf of the defendant.

Defendant-Appellee.

THE HONORABLE JUDGE PRESIDING.

Defendant-Appellee.

ATTORNEY GENERAL,
PRESIDING JUDGE,
MARION COUNTY and RESPONDENT
TRIAL D. FINNEGAN, also known as

A.

Plaintiff-Appellant,

DR. LOUIS I. DOMNITZ,

29 I.A. 606

COURT.

This is an appeal by the Defendant from a judgment entered in the Municipal Court of Chicago, Cook County, Illinois, in the sum of $1,500.00. The action was heard before the Court on a contract, attachment and garnishment proceeding. In the garnishment proceeding the Northern Trust Company was named as Garnishee. The Plaintiff instituted suit for professional services alleged to have been rendered by him to the Defendant in an effort the sum of $1,500.00 plus also an claims by the Plaintiff on account of legal fees in motion for services alleged to have been rendered by the Defendant by Dr. Clarence Darrstein, Dr. Irwin I. Miller and Dr. Louis I. Domnitz, during the year of 1957.58.

Defendant's motion for a new trial was overruled, and upon motion of counsel the cause is now in this court, being in the year of 1957.58.

Plaintiff's original agreement to charge one fifth as the 3rd day of December, 1951, upon which it claims that the Plaintiff's claim is for medical services and is brought under the terms of Dr. Irwin I. Miller and Dr. Clarence Darrstein assigned by Dr. Domnitz, to E. Miller and Dr. Darrstein, not just to waive to recover the sum of $1,500.00, by virtue of very clients retained by the Plaintiff, together with three percent of the recovered for and on behalf of the defendant.

Thereafter the plaintiff filed an amended statement of claim on January 5, 1937, itemizing a statement of claim for services rendered by the plaintiff to the defendant in the sum of $500, together with the accounts belonging to the plaintiff by virtue of and under certain assignments in the total sum of $797.38.

It is further alleged in the amended complaint that the plaintiff is the bona fide owner of the above choses in action, and that the "aforesaid choses in action were assigned to him on the 4th day of December, 1936, by the said Dr. Clarence Bernstein, Dr. Joseph L. Miller, and Kathryn Graf, for valuable considerations to them paid". In said statement of claim are set out each/several of the assignments, to which are attached affidavits that the assignors signed the assignments and were sworn to before a notary public on the 4th day of December, 1936.

It is further alleged in the amended complaint that the defendant was also known as Frederick Dalton and Frederick Dalton Michael, that he is not a resident of the State of Illinois, and that the place of residence of the defendant is Ponce De Leon Hotel, Miami, Florida.

It is further alleged that the plaintiff claims $1,362.25, and a writ of attachment against the garnishee therein named, whom the plaintiff designated as having property, effects, choses in action or credits in its possession or power, belonging to the defendant Fred D. Michael.

The defendant filed his appearance and his affidavit of merits in which he denies that the plaintiff has a valid claim against the defendant for professional services, and further denies that there is anything due from him to Clarence Bernstein as a physician, and states if he rendered any services he did it so carelessly and negligently that the defendant was injured thereby. Defendant

of the

further denies that Louis E. Schmidt was employed by the defendant, and that if he rendered any services he did it as an aid and assistant of Bernstein; and further, if Dr. Miller rendered any services, he did so as an aid and assistant of Bernstein and was employed by Bernstein; that the defendant, because of the unskillful and negligent care and treatment of Bernstein and his assistants, was obliged to employ another physician, to-wit, McArthur, and incur medical bills, hospital bills and nurses' bills at an additional expense of $1500. Defendant further denies that he is indebted to Kathryn Graf; that Kathryn Graf was paid for all services she rendered to the defendant and that she breached her contract in Florida while defendant was in a helpless condition.

The defendant further denies that his place of residence was at the time of the commencement of the suit or is at the present time, Miami, Florida, and states that his address and place of residence at the time of the commencement of the suit was 57 E. Harrison Street, Chicago, Illinois, and denies that assignments were made to the plaintiff.

When the case came on for trial, the defendant, on January 25, 1937, moved for a continuance, and from the report of the proceedings contained in the record it appears the defendant made a motion for continuance on the ground that the defendant was in Miami, Florida and unable to attend. This motion was made before one of the Judges of the Municipal Court, who granted the continuance to March 8, 1937, to give the defendant sufficient time to take depositions if it were not possible for him to be present at the time, and instructed the Clerk to mark the court proceedings, "the last continuance". On March 5, 1937, the defendant again made a motion for a continuance on the ground that defendant was sick and would be unable to attend court on March 8, 1937, the day set for trial,

and in support of the motion was the doctor's certificate as to the condition of health of the defendant. Upon consideration by the court, the motion for continuance was denied and the court proceeded to a hearing. After a hearing of the evidence, the judgment appealed from was entered.

The principal point called to our attention by the defendant is that the amended statement of claim does not state a cause of action on behalf of the plaintiff as assignee of the alleged claims of Clarence Bernstein, Joseph L. Miller and Kathryn Graf.

Ch. 11, Ill. Rev. Stats. 1937, entitled "Attachments", par. 26, sec. 26, provides that the provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act, shall apply to all proceedings under the provisions of the Attachment Act.

Sec. 27 provides:

> "The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons."

Sec. 28 provides:

> "No writ of attachment shall be quashed, nor the property taken thereon restored, nor any garnishee discharged, nor any bond by him given canceled, nor any rule entered against the sheriff discharged, on account of any insufficiency of the original affidavit, writ of attachment or attachment bond, if the plaintiff, or some credible person for him, shall cause a legal and sufficient affidavit or attachment bond to be filed, or the writ to be amended, in such time and manner as the court shall direct; and in that event the cause shall proceed as if such proceedings had originally been sufficient."

There is nothing in the record from which it appears that the motion to strike the statement of claim, or as amended, was made in the proceeding in the lower court. The sole question seems to be whether the sworn statement of claim was sufficient for the

purpose of issuing a writ of attachment. Applying the section of the Attachment Act on Amendments, it appears that no attachment shall be quashed nor garnishee discharged because of the insufficiency of the original affidavit, writ of attachment, or bond. Evidently this provision was for the purpose of giving the plaintiff an opportunity to file a statement of claim in compliance with the statute and to proceed to a hearing before the court in the event the defendant, upon motion, questioned the sufficiency of the statement and the motion was sustained by the court.

The issue heard before the court was, in part, whether the defendant was a resident of the State of Illinois. The evidence presented was considered sufficient, together with the evidence on the question of assignment, for the court to enter the judgment from which this appeal is taken.

Whether the assignment complied with the statutory provision of this state, Ch. 110 of the Practice Act, par. 146, sec. 22, provides that the assignee and owner of a non-negotiable chose in action may sue thereon in his own name, and shall allege in his pleading on oath that he is the actual bona fide owner thereof, and set forth how and when he acquired title, and we are of the opinion that the plaintiff did meet the requirements provided for by statute. In his amended statement of claim, which was sworn to, the plaintiff alleges that he is the bona fide owner of the choses in action, and that the choses in action were assigned to him on the 4th day of December, 1936 by the said assignors for valuable consideration paid to them. The assignments are set out in the pleadings. Therefore, it would seem that from the amended statement of claim the assignee sued thereon in his own name, and in his pleadings shows that he is the bona fide owner thereof and gives the date when the choses in action were assigned, and states that the assignments were made for valuable consideration paid to the assignors.

While the pleadings omit the word "actual" as called for by the act, still the plaintiff does state that he is the bona fide holder of these choses in action, on the grounds herein indicated, and we are of the opinion that this was sufficient, in view of the fact that there was no specific motion made to strike the amended affidavit of claim for want of sufficiency. The defendant stresses the point that the amended statement of claim sets out that these assignments were executed on the 4th day of December, 1938, which was the date allowed subsequent to the time the suit was instituted. However, as we have indicated, the question should have been raised by motion, to strike so that the plaintiff might be given opportunity to meet this issue. Not having made the motion, it is now too late to raise the question in this court.

In the discussion of the question of sufficiency of the pleadings, Ch. 110, par. 166, sec. 42 of the Practice Act. (Ill. Rev. Stats. 1937) provides in part as follows:

> "(2) No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet."

Then the provision goes further:

> "(3) All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived."

The method by which these objections are to be raised is provided for in Section 45, Par. 169, as follows:

> "(1) All objections to pleadings heretofore raised by demurrer shall be raised by motion. Such motion shall point out specifically the defects complained of, and shall ask for such relief as the nature of the defects may make appropriate, such as the dismissal of the action or the entry of a judgment where a pleading is substantially insufficient in law, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, * * *"

Then if the motion is made and allowed, the Practice Act provides for amendments such as may be allowed by the court. This is also provided by Rule 135 of the Municipal Court Act on "Amendments", wherein it is provided that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. * * " Then there is Rule 77 of this Act, which provides that "The court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay a fair trial of the action", and which in effect is the same as the section to which we have referred in this opinion on that point.

Then Rule 95 which is in line with the Practice Act, provides that "No demurrer shall be allowed, but the court may order any pleading struck out on the ground that it discloses no reasonable cause of action or answer. * * **" And finally, Rule 308 provides, "Excepting to the extent that they are inconsistent or in conflict with these rules the provisions of the Civil Practice Act are hereby declared to be applicable to proceedings in the Municipal Court."

By the Act entitled, "Attachments", paragraph 26, section 26, provides that the provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act, shall apply to all proceedings under the provisions of the Attachment Act. We have in part discussed the rules applicable to trials in the Municipal Court, and in view of the provisions of the statute as to the application of the Practice Act to attachments, we are of the opinion that there is no real inconsistency between the the Practice Act and the Rules of the Municipal Court and that this court would not be justified in reversing the judgment upon the ground urged. For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39682

SOUTH SIDE WINDOW FRAME SHOP, INC., a corporation,

(Plaintiff) Appellee,

v.

L. D. PARKER and ACME SASH & DOOR COMPANY, a corporation,

(Defendants) Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

294 I.A. 607

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

A judgment by confession was entered on July 15, 1936, against L. D. Parker, H. Vandenberg, and Acme Sash & Door Co. for $765.38, upon a promissory note which provided for a judgment by confession. On August 24, 1936, this judgment was vacated on petition of the defendants L. D. Parker and Acme Sash & Door Co. on the ground that H. Vandenberg was dead at the time the judgment by confession was entered. Upon the trial of the case before a jury on May 14, 1937, a verdict was returned and the court entered judgment for $700 against the defendants L. D. Parker and Acme Sash & Door Co., from which judgment the defendants appeal.

The sufficiency of the pleadings in the case is not questioned.

The action is based upon the promissory note, from which it appears the Acme Sash & Door Company was indebted to the plaintiff for window frames it had purchased from the plaintiff on an open account. On September 12, 1931, V. A. Johnson, president of the plaintiff company, talked to Vandenberg and Parker, officers of the defendant corporation, about the account. A note for $600, payable to the plaintiff in 90 days was signed by the Acme Sash & Door Company by H. Vandenberg, Pres., L. D. Parker, Secy. Subsequent thereto V. A. Johnson, plaintiff's president, returned and talked wit

SOUTH CLAY TIMBER COMPANY, INC.,
a corporation,

(Plaintiff) Appellee,

v.

P. B. PARKER and JOHN DOES 1 and 2
COMPANY, a corporation,

(Defendants) Appellants.

29423 I.A. 607

Vandenberg and Parker and told them that the bank would make a loan provided they would sign the note individually; that they then took up the matter with their attorney, and from his evidence it appears that -

> "The question was raised whether it would be all right if Mr. Parker and Mr. Vandenberg would sign on the face of the note as accommodation indorsers and I told them in my opinion that would be all right and so they did."

After they signed the note as indicated, Johnson discounted it for the plaintiff at the Mutual National Bank of Chicago. A payment of $75 was made at maturity, and it appears from the evidence that V. A. Johnson testified he "paid the balance on the note" after maturity and picked up this note from the bank. The Acme Sash & Door Company made an assignment for the benefit of its creditors, and in 1932, Mr. Curley, the trustee or assignee, paid 8 per cent dividend.

It further appears from the evidence of Johnson, that on September 12, 1931, the defendant Acme Sash & Door Company, a corporation, was indebted to the plaintiff in the sum of $600 for merchandise sold and delivered to the defendant by the plaintiff, and the plaintiff having received the note from the defendants, signed by Vandenberg and Parker, there was due at the time of the trial, including interest and attorney's fees, the sum of $716.86.

No denial is made by the plaintiff that the note was given without consideration to Parker for his signature, or that he was an accommodation party to the instrument. Section 29 of the Negotiable Instruments Act, Illinois State Bar Statutes, 1935, Ch.98, par.49, provides:

> "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party, and in case a transfer after maturity was intended by the accommodating party, notwithstanding such holder acquired title after maturity."

There is no doubt that the defendant Parker signed the note as indicated on the face of the instrument. While there is no want of consideration pleaded by the defendant, still it has been held by this court in Many, Blanc & Co. v. Krueger, 153 Ill. App. 327, that -

> "Want of consideration is no defense to an action upon a demand promissory note which was executed by the defendant as accommodation paper and delivered to the payee, co-maker's creditor, to secure a matured debt, even though the maturity of the debt was not extended and the payee had knowledge of all the facts."

The defense offered by the defendants is that there was want of consideration, but as we have indicated, by the signing of the note even though Parker was an accommodation party, still he is liable on the instrument to the holder for value. The rule announced in the case of Many, Blanc & Co. v. Krueger, supra, applies.

From the evidence appearing in the record the jury was justified in returning a verdict for the plaintiff.

The defendants also offer the defense that for want of presentment for payment, Parker is not liable on the instrument. Section 70 of the Negotiable Instruments Act, Ill. Rev. Stats. 1935, Ch. 98, par. 91, is pertinent upon this question, wherein it is stated:

> "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument except in case of bank notes but if the instrument is, by its terms, payable at a special place and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

The defendants suggest to the court that Sec. 88 of the Negotiable Instruments Act, Ill. Rev. Stats. 1935, Ch. 98, requires that Parker be discharged for failure of the plaintiff to give notice of dishonor. This would have applied if Parker had been an indorser, but being a maker he was not entitled to such notice.

Another point raised is that where a negotiable instrument is made or accepted for accommodation and has been paid by the party accommodated, it is discharged. It does not appear from the record filed in this case that the plaintiff has been paid. On the contrary, Mr. V. A. Johnson acted as president of the company, as indicated in this opinion, and it does not appear from anything before us that there was a transfer of this account to Johnson, or that he has any interest in the outcome of this litigation.

For the reasons stated the judgment of the court is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39708

JOSEPHINE YASBEC,

(Plaintiff) Appellee,

v.

A. A. SPRAGUE and BRITTON I. BUDD, as Receivers for CHICAGO RAPID TRANSIT COMPANY,

Defendants,

and

ALBERT A. SPRAGUE, as permanent Trustee in Proceedings now pending in the United States District Court of Northern Illinois, Eastern Division, for the Reorganization of Chicago Rapid Transit Company, Debtor, pursuant to Sections 77A and 77B of the National Bankruptcy Act,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

26A

294 I.A. 607

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a verdict and judgment finding the defendants guilty and assessing plaintiff's damages at $32,500.

The action was for personal injuries resulting from an accident alleged to have been caused by the negligence of the defendants. The accident occurred on defendants' station platform while plaintiff as a passenger was waiting to take a train operated by the defendants and fell off the platform in front of one of the defendants' trains, sustaining injuries.

At the close of plaintiff's case and at the close of all the evidence, the defendants moved the court to direct a verdict in their favor, which ruling was reserved by the court, and after the verdict was returned, defendants moved the court for judgment in their favor, notwithstanding the verdict, which motion was overruled and judgment entered upon the verdict against the defendants.

The original complaint upon which this action was based, alleged that on June 18, 1935, while the plaintiff was upon the

ALBERT A. [illegible], as personal insurance in
proceedings now pending in the United
States District Court of Northern Illinois,
Eastern Division, for the Rehabilitation
of Chicago Rapid Transit Company, Debtor,
pursuant to sections 77B and 77B of the
National Bankruptcy Act,

Appellant.

No. [illegible]

This is an appeal from a verdict and judgment finding the defendants guilty and assessing [illegible]' damages at $12,500.

The action was for personal injuries resulting from an accident alleged to have been caused by the negligence of the defendants. The accident occurred on Halsted Street, station platform of the defendants' elevated railroad. The evidence was conflicting in that it tended to show [illegible] was struck by the defendants' train, while plaintiff's case rested on the testimony of [illegible]'s sole eye witness, who testified that the plaintiff was [illegible] at the time of the accident, the defendants' train was not at the platform but [illegible] in their favor, which motion was overruled by the trial court, and after the verdict was returned, defendants moved for a judgment notwithstanding the verdict, which motion was overruled and judgment entered upon the verdict against the defendants.

The evidence [illegible] that on June 12, 1936, while the plaintiff was upon the

elevated platform of the defendant road, "she thereupon tripped, stumbled, slipped and fell from said platform." Upon the trial, plaintiff amended this paragraph by adding the words, "against an uneven plank in the platform and." The manner of plaintiff's falling is alleged to have been that she "tripped, stumbled against an uneven plank in the platform and slipped and fell from said platform."

No question is raised by the defendants as to the sufficiency of plaintiff's complaint.

The accident involved in this case happened on the evening of June 18, 1935, about 9:30 o'clock on defendants' station at 22nd street or Cermak Road. The platform from which the plaintiff fell was on the east side of the tracks and she was waiting for a northbound train. The station platform on the east side of the tracks was 369.9 feet long. About midway between the north and south ends of the platform was a canopy 72.5 feet long. From the south end of the canopy to the south end of the platform was 171.9 feet. The evidence offered shows that the accident happened south of the south end of the canopy, there being variance in the evidence as to the exact location of the accident. Plaintiff at the time of the accident was 27 years of age, and unmarried. Prior to the time of the accident she had worked for a considerable time for the Galvin Radio Company, earning $17 to $20 a week, working from 8 to 10 hours a day.

On the evening of June 18, 1935, after finishing her supper, the plaintiff took the south side elevated to 63rd and Halsted Streets, and there met a girl friend to shop for a spring suit. The plaintiff was returning home on the elevated intending to get off the elevated at 22nd Street and there take a street car

west to her home at 3025 West Cermak Road. When the plaintiff got off the train on the 22nd Street platform she was alone; she observed that the street was dark and gloomy. Not many people were on the street at that time, so she decided she would not go down to take the street car, but wait for the next train, so that she could go down to the loop and transfer to another elevated train which would take her near her home.

When she left the train she walked to a point on the platform south of the canopy where the advertising signs were lower so that she might look over into 22nd Street. She testified that at that time -

> "I saw the train approaching. When the train came along I started forward and I stubbed my right toe in boards on the platform and I lost my balance, and I fell over, and that is all I remember that night. * * * It was a board in the platform that I stumbled against. It was solid and my toe would not give, so I lost my balance and I went over. It was the right toe. * * * At the time I stubbed my toe I was about two feet from the west edge of the platform. At the time I stubbed my toe the train was pretty close. It was pulling into the station, going north. * * * I was about 12 or 13 feet from the south edge of the canopy when I stubbed my toe."

The motorman on the train approaching the place where the plaintiff was standing facing west, testified he saw her take two quick steps and then "made a - dove right in front of my train."

There was before the jury evidence of witnesses who were attracted by the fact that an accident had occurred. One of the witnesses, George Lawson, testified that, at the time, he lived on the third floor of the premises at 2220 South Wabash Avenue; that the rear of the building was about 35 feet from the elevated structure; that from the back porch of the building he could clearly see the elevated platform; that on the night in question he heard the quick stop of the train and immediately went out on the back porch to investigate, and looking over the station platform he saw the train there. He stated:

"I should judge the front end of that was up halfway under canopy. * * * I could see just the south end of the canopy from my porch. I went over on the next porch and tried to see the front of the train. I did not see the front end of the train. I saw the back end. * * * The front end of that car was up there [indicating]. The first car. That was evident because it is a two-car train. The front end of that car, or the first car, evidently was up under the canopy."

Another witness, Ben Dank, testified he was on the platform immediately after the accident occurred, and this is what he said when called as a witness:

"When I got there the train was standing about 25 feet from the north end of the canopy. There were two cars in the train. There had been an accident up there and they were taking some girl down. There was some confusion about some boards there, but I did not see them at the time."

His testimony was for the purpose of showing the location of the cars after the accident occurred.

The question involved here is dependent upon the facts as they appear in the record. The principal question is: At what point did plaintiff fall from the platform? She testified it was from 12 to 13 feet from the south end of the canopy.

A witness by the name of Frank Novoson, whom the defendants severely criticized, testified that on the evening in question he was in Colosimo's Restaurant, which is located at 22nd and Wabash Avenue, near the 22nd Street station; that he was there with his wife, and upon leaving, about 9:30 in the evening he learned of an accident which occurred on the elevated station at 22nd Street. This witness testified he was an investigator in a law office, and being interested he went up on the station platform; that when there he examined the platform just south of the south end of the canopy, and further said:

"I examined the entire section south of the canopy. There was a reason why I examined that part of it. The train was not there at the time. There were scraps of clothing and what appeared to be blood on the rails down below near that point. I would say it extended from about 10 feet south of

> the south end of the canopy to about 15 or 20 feet north of the south end of the canopy. The platform appeared to be made of planks, possibly two by fours. The planks were just a little bit narrower. The boards seemed very old on the entire platform. They were damp. It was not raining, it was a sort of a misty night. It was drizzling. The platform was rough. At one particular point that I examined, which was a point about 14 feet south of the south end of the canopy, there were two boards at the west end they were raised above the general level of the platform about half an inch. The rise started from the center of the board up to the west end approximately a half inch, maybe just a little bit more. I found both boards up that way. It appeared that the wood around the nails had rotted away so that the head of the nail would not hold the board any more."

He also stated that subsequently he met plaintiff's sister and as a result, arrangements were made with the Gibson Studio, located in Chicago, to take photographs of the planks in the platform immediately; that on the evening of June 19, 1935, the day following the accident, a photographer, who was not identified otherwise than as "Freddy", an employee of the Gibson Studio, took the photographs offered in evidence by the plaintiff. The defendants point to the fact and seem to stress the point that this employee of the Gibson Studio was a Chinaman, and that the photographs were "fakes". However, the photographs were admitted in evidence in the absence of the employes of the Studio, but upon the testimony of Novoson that they were a correct representation of the place where the accident occurred and of the platform as it was, and that, from his examination of the platform immediately after the accident, they were a correct representation of the boards in the platform when the pictures were taken. From these pictures it appears that two new 2 x 4 planks were placed in the platform immediately after the accident, at the point about where the accident is alleged to have occurred, and there seems to be no question that this was done, because it was one of the employees of the defendant company who did the work. The boards which were removed were not produced by the defendants for the

purpose of giving the jury such information regarding the accident as might be helpful, although it was reported to the claim agent that the carpenter of the defendant company had thrown them in the alley and that he, the claim agent, expressed regret that this was done.

The defendants point to the fact that thirteen witnesses, some of them employees, some policemen, and others, examined the platform shortly after the accident, and that they all testified there were no defects therein and no boards raised above the level of the other boards in the platform. However, these were not witnesses who were present when the accident occurred, and they they were dependent largely upon the testimony of the motorman, who was the only occurrence witness, in placing the location of the accident at a point on the platform. He stated that the plaintiff was about 5 feet in front of the train when she jumped and that the train moved about 18 or 20 feet before he stopped; that he stopped about 20 feet from the south end of the canopy, and later backed up the train about 6 feet. It is urged by the defendants, that this testimony would place the spot where the plaintiff fell from the platform at about 40 feet south of the canopy. It was upon this statement of the motorman that the five police officers stepped off the distance and testified as to how far north from the south end of the platform the plaintiff's body lay. There is also evidence of some of the employees of the defendants who testified as to the location, but when we consider the evidence of the plaintiff, as well as that of Mr. Novoson, who has been so severely criticized for the reason that he was an investigator, it would appear that she stumbled from 12 to 13 feet south of the south end of the canopy. Mr. Novoson fixed the place where the boards were raised at about 14 feet, and where

the new 2 x 4's were placed in the platform at about 15-1/2 feet.

These were clearly questions of fact for the jury, together with the evidance of the two witnesses for the plaintiff who testified that the train, when it stopped, was under the eaves of the canopy some distance. The fact that the defendants criticized Novoson for being an investigator should not influence the jury, when we consider that there were employees of the defendant company who testified as witnesses and who were not criticized by the plaintiff for their testimony, except as to its correctness from the facts in evidence.

From the arguments of the parties in their briefs we are not impressed with the suggestion made by the defendants that the photographs are "fakes," or that there was anything false about the testimony of Novoson. Great stress is laid upon the fact that the person who took the photographs was not produced. Novoson testified that this photographer was in Detroit and that he was an employee of the Gibson Studio, located in Chicago. No doubt the defendant company had plenty of time to investigate these facts.

One of the outstanding features in this case is the fact that the 2 x 4 planks were placed in the platform at about the spot where, according to Novoson's testimony, the boards were raised about 1/2 inch above the level of the other boards in the platform. Novoson also testified as to the condition of the boards and his testimony corroborates that of the plaintiff that when walking toward the train for the purpose of becoming a passenger she stubbed her toe against a plank, which caused her to fall.

In arriving at their verdict the jury considered whether the plaintiff fell in front of the train or, as the motorman testified, jumped.

From plaintiff's testimony there is no evidence which would justify the conclusion that she attempted to commit suicide, and this fact is further emphasized by plaintiff's testimony that she met a friend at 63rd and Halsted Streets, in Chicago, and went window shopping, having in mind the purchase of a spring suit, and it was from this shopping expedition she returned on the elevated train. Therefore, when the defendants urge that while it is true the presumption is she did not attempt to commit suicide, this presumption is dissipated by the fact that the motorman testified she dove or jumped in front of his train at the time the accident occurred. The statement of the motorman was one of fact, as well as the statement of the plaintiff, both of which were passed upon by a jury, together with all the other facts and circumstances appearing in the record, and we believe the jury was right in finding the defendants guilty as charged.

The defendants contend that the court erred in refusing to direct a verdict for the defendants and in refusing to enter judgment for the defendants notwithstanding the verdict, and urge that the plaintiff must recover, if at all, upon the specific negligence which she charged against the defendants, and she cannot recover upon other or different negligence, even though the same were proved.

We have carefully considered this contention in so far as negligence is charged in plaintiff's original as well as amended complaint is concerned, and we are of the opinion that the charge was sufficient to justify the court in entering judgment upon the verdict of the jury.

The evidence of several witnesses was heard and passed upon by the jury, and as a matter of fact the number of witnesses for the defendants was larger than for the plaintiff. This of itself would not militate against the verdict. The verdict depends upon the facts

as evidenced by the testimony of the several witnesses, and is not altogether controlled by the number of witnesses, but upon the evidence which must preponderate in favor of the plaintiff upon the facts as alleged, and unless there is a preponderance, then the verdict must be for the defendants.

The defendants urge that the judgment based upon the verdict is against the manifest weight of the evidence, and points to: (1) That there was no negligent defect in the platform. We have already stated that this was one of the facts considered by the jury.

As to point (2), the defendants admit the fact regarding the presence of the plaintiff on the platform on the night in question. The reason the plaintiff was on the platform was before the jury and, no doubt, considered. The defendants urge, however, that the plaintiff took a circuitous route to reach her home. This too was before the jury. The manner of plaintiff's fall after she stubbed her toe is pointed to as most extraordinary, and that the plaintiff should have fallen to the east rather than to the west, as appeared from the evidence, but the plaintiff did fall, and the jury had this question of fact before it. There is always in case of accident a question of negligence, and upon a trial before the court and a jury, the jury is the arbiter to pass upon the evidence and the law controlling, as given by the court, and to determine the issues before it, and this is what the jury did in the case before us.

It is stressed by the defendants that the photographs admitted in evidence show that repairs were made by the defendant company after the accident; that two new boards were placed in the platform; that the photographs were taken, manifestly, after June 19, 1935, and that evidence of this character is not admissible.

While it is true the courts have held that evidence showing repairs were made by the defendant after an accident is not generally

altogether

admissible, still in this case the evidence offered by the plaintiff shows the boards in the platform were not level with each other and that there was negligence in not keeping the platform in a state of repair such as would prevent the plaintiff from stubbing her toe and falling from the platform in front of the approaching train. That was the issue in the case, and when the pictures were taken soon after the accident the witness Novoson had testified as to the condition of the platform at the time and place of the accident. That would not indicate it has been stressed by the plaintiff that the fact repairs were made would mean the defendant did not keep the platform in a good state of repair. In the case of Howe v. Medaris, 183 Ill. 288, which has been called to our attention, the Supreme Court said:

> "Counsel insist this evidence (of repairs), even though it be inadmissible, would not amount to reversible error. If this were the only error relied upon by appellants we think it would justify a reversal of the judgment below. Whether the admission of such evidence over objection will amount to reversible error is stated in Hodges v. Percival, supra, (132 Ill. 53), as follows: 'If it can be plainly seen from the record that the error complained of could not have possibly worked any injury to the complaining party, and that the verdict must have been what it was in spite of such error, then the judgment ought not to be reversed.' "

The error complained of is not such as would justify a reversal upon that ground.

The final question suggested by the defendants is that the court erred in giving instructions for the plaintiff and in refusing to give proper instructions to the jury for the defendants. They call our attention to the following given instruction for the plaintiff:

> "In considering this case and in passing upon your verdict you are not required to set aside your own observations and experience as men in the affairs of life, but on the other hand you have a right, upon consideration of all the evidence, in the light of your own common observation and experience as men in the affairs of life, to say where the truth lies upon any material fact in the case. If, after such consideration

> of all the evidence, in the light of your own common observation and experience as men in the affairs of life, you believe that plaintiff has proved her case as alleged in the complaint by the greater weight of the evidence, you should find for the plaintiff."

and complain that the jury is not limited to the specific negligence alleged against the defendants, but the instruction merely requires that the plaintiff "prove her case as alleged in the complaint," and further complain that the jury may rely upon their "own common observation and experience as men in the affairs of life" to say where the truth lies upon any material fact in the case. It is urged that the jury may find the defendants guilty of anything which the jury may consider as constituting negligence, and could consider two of the acts charged as negligence, which the court excluded. The court, however, upon the excluded portion of the pleading instructed the jury upon this question and said:

> "The court withdraws from your consideration the following charge, contained in sub-paragraph (c) of paragraph 3 of plaintiff's complaint, to-wit, that 'defendants carelessly and negligently caused, permitted and allowed divers obstructions to be and remain upon said platform, ' * * **"

and further upon the issues gave the instruction to the jury tendered by the defendants, which is as follows:

> "Plaintiff charges in her complaint, filed herein, that on June 18, 1935, she was a passenger for hire and was riding upon a certain train of defendants operated in a northerly direction and that she alighted therefrom upon the platform at Cermak Road station, and that she then and there, in the exercise of ordinary care, stood upon said platform in the night time, while it was raining, awaiting the approach of a certain other train upon which she was then and there about to ride as a passenger; that while she was so standing on said platform, in the exercise of ordinary care, awaiting the approach of said train, she thereupon tripped, stumbled, slipped and fell from said platform to the tracks and said train ran into and struck against her and that she was thereby injured.
>
> Defendants in their answer to said complaint, filed in this cause, deny that plaintiff was a passenger, that she was in the exercise of due care for her own safety and also that she tripped, stumbled or slipped as charged in plaintiff's complaint; but alleges that plaintiff deliberately and purposely fell from the station platform to the railroad tracks, and admits that she was struck by the approaching train.

Plaintiff also charges in her said complaint, that defendants were guilty of the following 2 alleged acts of negligence, and that by reason thereof she was injured, to-wit:

2. That they negligently constructed and maintained the platform in question in a dangerous, slippery and skiddy condition;

4. That they negligently constructed and maintained said platform and the boards and planks constituting the same in a broken, rotten and defective condition.

Defendants in their said answer deny each and every one of said alleged acts of negligence charged in plaintiff's complaint.

Now, therefore, plaintiff, in order to be entitled to recover, must prove by the preponderance of the evidence that her injuries were caused in the manner charged in her complaint and that the defendants were guilty of some one of the aforesaid alleged acts of negligence; and she must also prove by the preponderance of the evidence that she herself was in the exercise of ordinary care for her own safety at and just before the time of the accident, or in other words, that she herself was free from any negligence causing or contributing to cause or bring about her fall and injuries. (Given)"

The jury had the allegations before it in determining whether from the preponderance of plaintiff's evidence the defendants were negligent, and it might be well to have in mind the portion of the instruction wherein the court instructs the jury that defendants denied that plaintiff was a passenger and that "she was in the exercise of due care for her own safety", but allege that plaintiff "deliberately and purposely fell from the station platform to the railroad tracks," and admit that she was struck by the approaching train, so that the jury was carefully instructed as to the issues involved in the proceeding.

And further, the court gave an instruction to the jury that plaintiff must prove that she was in the exercise of ordinary care for her own safety, and that if she failed to exercise care, then she could not recover. The instruction as given is as follows:

"If you believe and find from the evidence, and under the instructions of the Court, that plaintiff could and would have avoided falling and being injured, at the time and place in question, by the exercise of ordinary care for her own

> safety, and that she failed to exercise such care, if you believe she did so fail, and that her failure to exercise such care, if you believe she did so fail, caused or directly contributed to cause or bring about her fall and injuries, at the time and place in question, then you are instructed she was guilty of contributory negligence and that she cannot recover in this action, and your verdict should be not guilty. (Given)"

In considering the instructions by the court to the jury, it would seem to this court that the jury was fully instructed on the issues before it, and that there was no error in the giving and refusing of any of the instructions tendered by the parties.

As a result of the accident the plaintiff sustained a comminuted fracture of the entire right frontal temporal bone, a fracture of the right wrist, a comminuted fracture of the neck of the left humerus, an amputation of the left leg at the junction of the upper and middle thirds, and a fracture of the right scapula, and the jury, as we have indicated in this opinion, returned a verdict for $32,500, upon which the court entered judgment. The defendants make no complaint as to the size of the judgment.

One question remains to be considered and that is: Did the court err in entering judgment against the defendants as receivers and in awarding execution thereon? The form of the judgment was erroneous, but there is no question that the trial court could have corrected the error at the time the matter was pending there. The award of the execution against the defendants as receivers does not affect the judgment itself, but the judgment order should have provided that the amount be paid in due course of administration. The Civil Practice Act, Par. 216, Sec. 92, Ch. 110, Ill. Rev. Stats. 1937, provides:

> "In all appeals the reviewing court may, in its discretion, and on such terms as it deems just, - (a) exercise all or any of the powers of amendment of the trial court."

By the Rules of Practice and Procedure, Sec. 259.50 Ch. 110, Ill. State Bar Assn. Rev. Stats. 1937, this court may "of its own motion

should be not guilty. (Citation)"

In essence, the instruction by the court to the jury,
it would seem by this court that the jury was fully warranted as
the issues before it, and that there was no error in the finding and
returning of any of the instructions requested by the petitioner.

As a result of the conduct the plaintiff sustained a
committed prejudice of the entire right thereof thereof some, a
treasure of the right order, a consistent treasure of the seat of
the last measure, an enjoyment of the left leg at the location
of the upper and middle points, and a treasure of the right seconds,
and the jury, as we have indicated in this opinion, returned a
verdict for $2,500, upon which the court entered judgment. The
defendants make no complaint as to the size of the judgment.

One question remains to be considered and that is: Did
the court err in entering judgment against the defendants no
received and in entering execution thereof. The Code of the Judg-
ment was erroneous, but there is no question that the trial court
could have corrected the error at the time the matter was brought
there. The record of the execution against the defendants as
executrix does not affect the judgment itself, but the judgment order
executrix does not affect the judgment itself, but the judgment order
should have directed that the amount be paid in the course of
administration. The first practice int. rev. stat. sec. 8, p. 113,
111, rev. statu. 1917, provides:

"In all suits the residuary estate and, in the discretion
of the powers of commissioner of the first court, [illegible]
Simple part view. Sec. 3000. 1921, into court and [illegible] the sum motion
By the rules of practice and procedure, sec. 163, pp. 170, 171.

before or after submission of the case for decision, order amendment to be made." A like question before us was passed upon by this court in the case of Niemi v. Sprague, 288 Ill. App. 372, wherein a judgment was entered against Sprague, et al, receivers of the Chicago North Shore and Milwaukee Railroad Company for the award of an execution. This court said:

> "There is one error, however, that necessitates either the reversing of the case or the correction of the judgment in this court. The trial court awarded an execution upon the judgment. The appellants are defending as receivers of the Chicago, North Shore and Milwaukee Railroad Company. It is conceded that a judgment against receivers is payable in due course of administration and that it was error to award execution upon this judgment. Under the Civil Practice Act, however, there is no necessity to remand this case with directions to the lower court to correct the judgment. The judgment will be modified in this court by striking out the portion thereof which awards an execution and in lieu thereof directing that the same be paid by appellants in due course of administration. As so modified, the judgment will be affirmed."

Having considered the questions involved in this appeal, we affirm the judgment entered upon the verdict by the trial court, but the judgment order will be modified by striking out the portion thereof which awards an execution, and in lieu thereof directing that the same be paid by the defendants in due course of administration, and as so modified the judgment is affirmed.

JUDGMENT AFFIRMED AS MODIFIED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39725

EDWARD JOHNSON,

(Plaintiff) Appellee,

v.

FRANK VIZGARD,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

294 I.A. 607

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in the Municipal Court of Chicago in an action upon a promissory note, bearing date April 17, 1936, payable to the order of Edward Johnson, the plaintiff, and signed by Frank Vizgard, the defendant, for $495.15, which it is alleged was in payment of a first annual premium on a $15,000 insurance policy.

To this action the defendant pleaded that he had ordered certain policies from the Equitable Life Assurance Society, for whom the plaintiff was a salesman or agent, and that after the certain policy was written the defendant cancelled said policy and returned it to the plaintiff in accordance with the agreement had with plaintiff, permitting the defendant to return the policy if he was not satisfied.

One of the points made in this case is that the court erred in admitting incompetent, irrelevant and immaterial evidence and introducing on its own motion incompetent testimony, and further erred in commenting upon the evidence, arguing with the witnesses and continually interrupting the examination of witnesses and asking questions of witnesses.

The case was tried by the court, and the question hinges largely upon the conduct of the court in the examination of the witnesses as they appeared on the witness stand. It is always proper for the trial court to examine witnesses for the purpose of informa-

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tion regarding the facts in controversy. The controversy in this suit was as to whether the plaintiff was deceived by the defendant in representing that the note in question was a receipt for delivery of the policy to the defendant.

The facts regarding delivery of the policy and the alleged agreement entered into for cancellation thereof were all controverted questions of fact, and this being the case they were heard by the court. Assuming that the court asked the questions complained of by the defendant as being improper, still if there is evidence in the record which would justify the judgment, it will be presumed the court, in reaching a decision, did not consider any improper or incompetent evidence.

In Radtke v. The People, 171 Ill. App. 462, this court upon that question said:

> * * * * the rule is that, on a trial by the court without a jury, no improper or incompetent evidence will be presumed by a reviewing court to have influenced the court in reaching a decision, where there is sufficient proper evidence to justify the judgment. Merchants' Despatch v. Joesting, 89 Ill. 152; Kreiling v. Nortrup, 215 Ill. 195; Pratt v. Davis, 324 Ill. 300. There are also many Appellate Court decisions to the same effect."

Defendant contends that the court considered evidence which was not a part of the record. It appears that the defendant produced a witness to testify on his behalf to controvert the testimony of the plaintiff with reference to certain testimony as to the custom of insurance companies of permitting cancellation of policies, and that the court participated in the examination of this witness for the defendant, but stated that the several questions put to the witness were "off the record." This, of course, was not proper practice. In the trial of a case the record should be preserved in order that this court may determine whether in the examination of witnesses the questions asked were proper or not. The testimony in the instant case not having been incorporated in the record, we

are without benefit of the questions asked, so as to determine whether they were proper in the examination of this witness, but the defendant failed to object to the questioning of the court or to request that the testimony be recorded and, of course, the trial court was not given an opportunity by objection of the defendant to correct an error, if any had been committed. No ruling having been requested by the defendant and none made by the court, there is no basis for the alleged error, and as we have stated before, the presumption is that the trial court considered only such evidence as was competent and proper for him to hear.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39735

FRANCES CIESIOLKIEWICZ, as Administratrix of the Estate of Matthew Ciesiolkiewicz, deceased,

(Plaintiff) Appellee,

v.

THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

294 I.A. 607

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This was an action brought by the plaintiff to recover on three insurance policies issued by the defendant, each in the sum of $500, payable on the death of Matthew Ciesiolkiewicz, and on which the plaintiff alleged the defendant refused to make payment. A trial was had before the court and a jury, and at the close of the hearing of evidence a directed verdict and judgment on the verdict was entered in favor of the plaintiff and against the defendant in the sum of $1,787.50, from which judgment the defendant appeals.

The amended complaint alleged the issuance of three policies for $500 each; that the defendant refused to make payment, and that the policies were in full force and effect at the date of the death of insured.

The answer of the defendant to this complaint admits the issuance of the policies, and denies that the policies were in full force and effect on the date of the death of insured, and avers that the policies lapsed for non-payment of premiums due on June 5, 1933, and by reason thereof were not in full force and effect on the date of the death of the insured, October 16, 1933.

From the evidence it appears that as alleged the three policies of insurance were issued in the name of the insured; that the policies were dated November 18, 1929, May 12, 1930, and October 19, 1931, and were in the sum of $500 each, and were in force up to

[illegible]

[illegible]

[illegible]

and including May 8, 1933; that on September 26, 1933, the insured signed an application for reinstatement. At that time he paid $35.19 to the agent of the defendant company and a receipt was given for this amount. This application shows that the amount included premiums to October 9, 1933; that the insured was working for Armour & Company until September 29, 1933. It further appears from the evidence that he took two weeks off to repair his son's property; that on October 16, 1933, insured died of cerebral hemorrhage, and from the proof of death it appears that Matthew Ciesiolkiewicz quit work on September 29, 1933, for the reason that he was sick, and that he first complained of ill health in September, 1933.

It further appears from the evidence that Dr. Dybalski testified he examined the insured on October 10, 1933, and although he certified to the health department that the cerebral hemorrhage had its onset on September 10, 1933, "he must have meant" October 10, 1933, and he further stated that it must have been October 2, 1933, when he first saw him, and that the insured became acutely ill on October 2, and that he was unable to make a correct diagnosis.

It also appears that the insured made application for reinstatement of the policy, and the clause which provides for such application is as follows:

> "If this policy lapse for non payment of premiums it may be reinstated within one year from the date to which premiums have been duly paid, (1) upon the payment of all arrears, provided (2) evidence of the insurability of the insured satisfactory to the Company be furnished but such reinstatement shall not take effect unless (3) applied for in writing and (4) at the date thereof, the insured be alive and in sound health."

Attached to the application for reinstatement is the certificate of the superintendent of the defendant, in which certificate questions were asked and the answers inserted in the handwriting of the superintendent. The certificate is as follows:

"1. To what date have the arrears been deposited?
Monday 9 day of Oct. '33

2. If signature required, did you personally see each applicant on date signature was obtained?
Yes.

3. Has any of above applicants ever been rejected?
A. No.

4. Is each applicant in good health?
Yes.
If not, furnish full particulars by letter attached.

5. Check race.
White.

6. Do you recommend revival of the above policies?
Yes.

I hereby Certify that the above questions contain true answers, and that I witnessed every signature shown above, as required.
District or Detached Section Chicago Ogden Park
Signed T. M. Jordan
Superintendent."
Date: Sept. 26 '33

The question called to our attention by the defendant company is that the insurance policies sued upon lapsed for non-payment of premiums and the evidence shows that the application for reinstatement was never accepted or approved by the defendant company, so the minds of the parties to the insurance contract did not meet and the insurance policies were not in force on the date of death, and the plaintiff failed to establish a prima facie case. Therefore, it was error for the trial court to direct a verdict for the plaintiff.

As to whether or not the insured at the time of his death was in default, it is well to have in mind the provision for application for reinstatement, which is set forth in our opinion. There is no doubt that application for reinstatement was made by the insured on September 26, 1933; that the insured paid $35.19 to the agent of the defendant company and a receipt was given for this amount; that the amount included premiums to October 9, 1933, and that attached to the application was a certificate of the superintendent of the

"1. To what date have the
premiums been denominated
Sunday 9 July of Cal. '32

2. Has any of these applications
ever been rejected?
A. No.

4. Is each applicant in good
health?
Yes.
If not, furnish full particu-
lars by letter attached.

6. Is you recommend contract
of the above policies?
Yes.

I hereby Certify that the above questions contain true answers, and that I witnessed every signature above shown, as required.
District of
Detached Chicago Cook Pub
Section signed T. B. Jordan
Superintendent."

The question called to our attention by the defendant company is the insurance policies mud upon issued for reinstatement and the evidence shows that the application for payment of premiums and the evidence shows that the application for reinstatement was never accepted or rejected of the premiums received, so the clerk of the parties in the insurance contract are not met and the insurance policies were not in force on the life of decd, and the liability failed to maintain - rights Death ever. Therefore, it was error for the trial court to direct a verdict for the plaintiff

is to whether or not the insured at the time of his death was in default, it is well to have in mind the provisions for reinstatement, which is set forth in our opinion. There is no doubt that application for reinstatement was made by the insured on September 15, 1930; that the insured paid $28.73 on the agent of the defendant company and a receipt was given for this amount; that the amount included premiums to October 5, 1930, and that application the application not a condition of the reinstatement of the

defendant company, in which questions were asked, and answers inserted in the handwriting of the superintendent.

This certificate indicates that up to Monday, the 9th day of October, 1933, insured deposited the amount of premiums due at that time, and when making application, in reply to the question whether or not applicant was in good health, insured's answer was "Yes". Then the question is submitted to the superintendent of the defendant company whether he would recommend a revival of the policies, and his answer was, "Yes", and he further certified that the questions in the application for reinstatement contained true answers, and that he, the superintendent, was present when the signature of the applicant for reinstatement was placed upon the application. Then, after that was done, in about two weeks, one of the agents of the defendant company came to the home of the insured, and at that time the premium paid on September 26, 1933, and the additional premium paid on October 9, were entered by this agent in the receipt book, and he signed his initials, "R.M.W."; that this agent was introduced to the wife of the insured by Jordan, the superintendent, as the representative of the defendant company. At the time the agent called there was a conversation in which the wife of the insured asked him whether it was "O.K." and he said, "Yes, it must be O. K. as otherwise they wouldn't send him out". The evidence of this agent is not contradicted by any evidence in the record, and it is but reasonable to infer that the policy was reinstated.

The plaintiff contends that a clause in a life insurance policy that it will become void for non payment of premiums is put there for the benefit of the company, and it does not ipso facto become void if the premium falls due and is unpaid. In such case the company has a right to claim a forfeiture of the policy, or, if it sees fit, to waive that right and give the assured further

4

defendant counsel, in which questions were asked, and answers
inserted in the memorandum of the examination.

This certificate indicates that on behalf, the 3rd
day of October, 1955, Inspector Babcock the Inquiry at Hamilton in at
that time, and when motion application, in reply to the question
whether or not applicant has in mind Deputy, Inspector's answer was
"Yes". Then the question is submitted to the examination of
the defendant counsel whether he would recommend a refusal of the
petition, and the answer was, 'Yes', and he further qualified this
the questions in the application for reinstatement considered this
answer, and that is, the examination, was pressed upon the
signature of the applicant for reinstatement was signed upon the
application. Then, after that was done, in order the order, one
of the agents of the Department counsel came in the name of the
inspector, and at that time the person said on September 19th,
and the additional question put on October 3, were returned to this
effect in the counter book, that on August 4th instant, A.C.C.; that
this effect the inspector to the wife of the licensee in Detroit
the examination, in the information of the Department counsel.
At the time the agent called there was a conversation in which the
wife at the licensee asked him whether it was C.C.A., and he said, 'Yes'.
it was so C. B. as director that counsel was not'. The
evidence of this agent in the conversation by and between in the
second, and it is not necessary to refer that the matter was
reinstated.

The Magistrate considers that a stamp is a like insurance
policy that it will become void in the following at vacation if not
there for the benefit of the assured, and it does not [cease] cease
because void if the vacation until the [illegible] is signed. It
does not so C. B. as director that counsel was not'. The
evidence of this agent in the conversation by and between in the
second, and it is not necessary to refer that the matter was
reinstated.

opportunity to pay the premium. From the statement of facts, it would seem that the application was satisfactory to the defendant and the policy was reinstated.

Upon the question of waiver, the Supreme Court of our State, in the case of Baxter v. Metropolitan Life Ins. Co. 318 Ill. 369, said:

> "Waiver by an insurer results when it by an act, statement or course of conduct toward the assured recognizes the policy as existing though the time for payment of the premium has expired. Forfeiture of life insurance policies is not favored, and unless the circumstances show a clear intention to claim a forfeiture for non-payment of the premium such forfeiture will not be enforced. If the conduct of the insurer is such as to induce the assured to believe that a forfeiture will not be insisted upon, the insurer will be held to be estopped from taking advantage of such forfeiture."

It does not appear from the briefs that the authority of the agent T. M. Jordan was questioned. He did prepare the certificate and the answers of the applicant for reinstatement, and it would seem to the court that the statement itself has a bearing upon the question of whether the defendant waived any of the provisions contained in the policy, when we consider that after the certificate was signed and filed with the defendant, the company's agent collected further premiums which were due on the dates pointed out in our opinion. This fact would indicate that whatever rights the defendant had, it waived the question of forfeiture.

A life insurance company, suggests the defendant, is required to act promptly when reinstatement applications are made, so that the payments required may not be defaulted. After what was done in this case, and the collections made, we are inclined to the view, which is supported by the authorities, that if the conduct of the insurer is such as to create the belief in the mind of the insured that a forfeiture will not be insisted upon, the insurer will be held to be estopped from taking advantage of such forfeiture.

opportunity to pay the premium. From the statement of facts, it would seem that the application was satisfactory to the insurer and the policy was delivered.

Upon the question at point, the supreme Court of New York, in the case of Gardner v. Metropolitan Life Ins. Co. (19 III. 389, said:

> "Waiver by an insurer simply means it by an act, statement or course of conduct treated the insured regarding the policy as existing through the time for payment of the premium has expired. Forfeitures of life insurance policies is not favored, and unless the circumstances show a clear intention to claim a forfeiture for non-payment of the premium such forfeiture will not be enforced. If the contract of the insurer is such as to be induced upon, the insurer will be held to be estopped from taking advantage of such forfeiture."

It does not appear from the facts that the validity of the agent V. W. Jordan was questioned. He did promise the certificate and the answers of the applicant for reinstatement, and it would seem to the point that the statement itself is a bearing upon the question of whether the defendant waived any of the restrictions contained in the policy, when he examined that after the certificate was signed and filed with the department, the company's agent ratified further promises which were due on the date the policy set in any opinion. This fact would indicate that waiver rights the defendant had, it waived the question of forfeiture.

A life insurance company, suppose the defendant, is required to act promptly when reinstatement applications are made, so that the payments required may not be defaulted. After what was done in this case, and the obligations paid, be the insured be the view, which is supported by the authorities, that if the conduct of the insurer is such as to create the belief in the mind of the insured that a forfeiture will not be insisted upon, the insurer will be held to be estopped from taking advantage of such forfeiture.

As further evidence that forfeiture was waived, the plaintiff points to the fact that an ordinary receipt for premiums was given to the wife of the insured on September 26, 1933, and a subsequent payment was made to the agent of the company on October 9, 1933, which was entered in the receipt book on October 9, 1933, and in accordance with the rules of the company, this would indicate that the reinstatement was acted upon and officially recognized under Clause C, which is in these words: "C-Except as provided in Clauses A. and B, premiums are not to be entered in the Premium Receipt Book until the business is officially revived."

The defendant contends that the court erred in excluding evidence offered by the defendant on the issue, and its counsel at the close of the case offered to prove that the official records of the defendant company showed that the premiums on the policies sued upon were not paid and that the policies lapsed. The defendant also offered to prove that no action had been taken by the defendant company upon the revival application prior to his death. The trial court refused to admit any evidence on this subject.

To this contention the plaintiff cites the case of Baxter v. Metropolitan Life Insurance Co. supra, wherein the court upon a like question said:

> "It is also urged that it was error on the part of the trial court to refuse to admit in evidence books and records of the plaintiff in error which, it contends, show that the premium was not paid to the company. There was no error in this. While books of account of a plaintiff are competent evidence, the books of the insurer showing whether the agent had paid over the premiums to the company and how the company considered the insurance contract are necessarily self-serving in their nature."

which seems to be a complete answer to the defendant's contention that the action of the court was erroneous in refusing to admit the books of the company in evidence.

The defendant's theory is that the judgment is contrary to

the manifest weight of the evidence and contrary to the law.

From what we have said in this case on the questions involved, we are of the opinion that the judgment is not contrary to the law, and that the facts justified the court in directing the jury to find for the plaintiff.

For the reasons herein stated the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39590

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
MARTIN EVEN,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT
COOK COUNTY.

294 I.A. 607

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case is governed by the opinion in The People of the State of Illinois v. Jules Rosenthal, No. 39589.

The judgment of the Criminal Court of Cook County is affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

294 I.A. 607

39594

WALTER ALLEN STULTS,
Appellee,

v.

E. E. STULTS REALTY CO.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF EVANSTON

30 A

294 I.A. 608

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On November 30, 1935, upon the verdict of a jury, a judgment was entered on a judgment note dated June 1, 1929, for the sum of $8,839.59, against the E. E. Stults Realty Company. The judgment included interest and attorney's fees. Thereafter, an order was entered, granting the defendant leave to defend and that the judgment stand as security.

Defendant filed an affidavit of merits in which it is recited that the note upon which judgment was entered, was given without consideration, was issued by mistake, and that it was a renewal note issued to take the place of a former note, which former note contained no power of attorney to enter judgment. The original, or former, note was as follows:

"$5,000.00 February 1, 1923.

On Demand after date we promise to pay (Subject to present agreement only dated Dec. 1, 1928) to the order of Walter Allen Stults Five Thousand and no one hundred Dollars at 1519 Hinman Ave., Evanston, Illinois. Value received with 6 per cent interest from date until paid.

E. E. Stults Realty Company
By E. E. Stults, President
E. E. Stults."

The affidavit of merits further recites that prior to the execution of the original note above set forth, the following agreement was entered into between plaintiff and E. E. Stults:

394 A
294 I.A. 608

entered into between Affidavit and E. E. Smiths
of the original note sheets but first, the following statement was
the affidavit of Hattie Turpin vaudeville City Editor in the manuscript

E. E. Smiths, Plaintiff,
vs.
Affidavit,
Defendant.

State of New York,
County of Kings, ss.:

Hattie Turpin, being duly sworn, deposes and says that she is
employed as City Editor of the Brooklyn Daily Eagle; that on
December 2nd, 1920, upon the request of a party, whose
name she does not remember, but who represented himself to be
the plaintiff in the above entitled action, she delivered to
him the original note sued upon herein, which note was
returned to her by the said party on or about the 15th day of
January, 1921.

Deponent further says that she has no recollection of the
contents of said note, but that it was a
printed note issued by the Bond Department of the Brooklyn Daily
Eagle, which note contained the words "$5,000.00
Brooklyn, N. Y., January 1, 1920.
On demand after date we promise to pay (blank) the
sum of $5,000.00" together with the usual printed matter
appearing on a Judgment note issued June 1, 1920. The
Judgment was entered on a Judgment note dated December 2nd, 1920, upon the request of a party,
whose name she does not remember. Deponent says
that the Judgment entered was without
authority from the defendant, and that the
Judgment entered was entered in order
to secure the payment of the $5,000.00 note sued upon
herein, and that no consideration was passed by plaintiff
to defendant for the said note.

Sworn to before me this
2nd day of December, 1920.

[illegible]
Notary Public, Kings Co.
Clerk's No. [illegible]
Commission expires March 30, 1921.

3294

"Evanston, Illinois
December 1, 1922.

Received from Walter Allen Stults the sum of Five Thousand Dollars ($5,000.00) in the form of a loan, same to be secured at 6% annual interest by a general warranty deed to the property at the N. E. Corner of Montrose Ave. and North Lincoln Street. It is understood that said deed is to be held in escrow until said sum is returned or applied in the syndicate now being formed for the purchase of real estate.

The 6% interest is to be paid on principal sum until such purchase is made. It is further understood and agreed that said Walter Allen Stults is to participate in the profits accruing from sale of such properties in the same proportion as his funds bear to the total amount thus invested. At such time as the deed aforementioned is delivered to E. E. Stults according to the terms herein, said Walter Allen Stults is to receive a certificate of deposit for the above mentioned funds or an agreement as to how it is to be invested.

E. E. Stults."

The affidavit of merits further indicates that E. E. Stults received $5,000.00 from plaintiff, in accordance with this agreement, and thereafter delivered to plaintiff the demand note first above referred to, dated February 1, 1923, and that the $5,000.00 was invested in the purchase of an apartment building; that on October 6, 1924, plaintiff demanded from E. E. Stults interest from November 1, 1923, until the date of the letter, and that on November 13, 1924, E. E. Stults paid to plaintiff interest on this note from November 1, 1923, to July 1, 1924, and at the same time advised plaintiff that the money received from plaintiff had been invested in the apartment building referred to.

Defendant's position is that when the $5,000.00 was invested in the apartment building, he had complied with the terms of the contract entered into between the parties, and that thereafter, he was not indebted to plaintiff in any amount. Plaintiff's theory is that the $5,000.00 was turned over to the defendant corporation by its president on February 22, 1923, and that the money was kept and used by the corporation, and was never invested by it for the use of the plaintiff. The record indicates that in the letter of November 13, 1923, enclosing the interest on the amount in controversy,

"Executor" Citizens
December 1, 1921.

E. E. Stults stated to the plaintiff that he expected shortly to invest the money in a profit sharing property, and on November 13, 1924, E. E. Stults again wrote plaintiff that the money had been "transferred into the property known as the Sherwood Apartment Building, * * * located at the northwest corner of Montrose Avenue and Ashland Avenue." Accompanying this letter, was a circular containing certain details concerning the property purchased. A deed conveying this property to defendant and his wife was offered and received in evidence.

E. E. Stults testified that he used the entire $5,000.00 in the purchase of the Sherwood property, which cost in the neighborhood of $275,000, subject to a first mortgage of $165,000, and that in addition to this, he exchanged certain property of his own located at Winchester and Montrose Avenues, and other property located at the northwest corner of Central and Railroad Avenues, Evanston; that he gave a mortgage to the grantor for $40,000, and that plaintiff's share in whatever equity there might be in the property purchased "was in proportion to what $5,000 would be to that excess of 165 and 40, which is 205. That would be about 11.8%", and that the title to the Sherwood property remained in the name of E. E. Stults and his wife for some time.

As we view the transaction between these parties, it seems apparent that under the agreement entered into, it became and was a joint undertaking. Plaintiff's position is that there is no proof in the record that the money received by E. E. Stults was invested in the Sherwood property. E. E. Stults testified that it was so invested, and there is nothing in the record to indicate that it was not. E. E. Stults offered in evidence certain checks alleged to have been given to the person from whom the title to this property was procured, and which were given in payment for this property.

They were objected to by the plaintiff, and the objections were sustained. Plaintiff tacitly admits that the only consideration for the judgment note upon which judgment was entered, was the $5,000.00 paid to E. E. Stults under the agreement between the parties, together with certain accrued interest.

Although the trial was by a jury, which returned a verdict for plaintiff we are of the opinion that under the state of the record as it now stands, the judgment should not be affirmed. Therefore, the judgment of the Municipal Court of Evanston is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

DENIS E. SULLIVAN, J. CONCURS,
HEBEL, P.J. NOT PARTICIPATING.

39619

BYRON GOGGIN, Administrator of the Estate of LOUIS D. LEE,

Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

294 I.A. 608

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment entered in the Municipal Court of Chicago on a verdict of a jury, on February 3, 1937, for the sum of $800.00.

The action is predicated upon an insurance policy issued by the defendant company on February 1, 1927, on the life of Louis D. Lee, who died on August 17, 1935. The policy provides for the payment of a premium of $3.68 per month, beginning with February 1, 1927, and also provides for a 31 day grace period in case such premium be not paid on the due date. The record indicates that the policy had lapsed for the nonpayment of the $3.68 premium, due December 1, 1933, or within the 31 day grace period. The policy also contained a provision to the effect that in case of lapse for nonpayment of premiums due, that before the policy would be revived and reinstated, the insured be required to make "payment of arrears and the presentation of evidence, satisfactory to the company, of the insurability of the insured." On January 30, 1934, Byron Goggin, who now sues as administrator of the estate of Louis D. Lee, and in Lee's lifetime, paid to the insurance company at its office in the city of Chicago, the sum of $7.36, and received the following receipt:

receipt:

city of Oshogbo, the sum of £7.00, was received the initiated
Isa's lifetime, being in the insurance company in its office in the
who now owns an administrator of the estate of Isaiah S. Isa, and in
the immutability of the insured. On January 20, 1932, Isaac Bosede,
and the presentation of evidence, entertained in the amount, it
and validated, the insured be compiled to make judgment at interest
noncompliance of execution due, that before the policy could be carried
also contained a provision to the effect that in case of lapse for
December 1, 1932, or within six day grace period. The policy
policy had lapsed for the nonpayment of the £8.00 premium, due
premium be not paid on the due date. For second instance this was
1932, and also duration for a 31 day grace period in case such
payment of a premium of £8.00 was made, beginning with December 1,
D. Isa, who died on August 17, 1932. The policy contained the the
by the defendant company on January 1, 1932, in the life of insta
on February 3, 1932, for the sum of £800.00.

The action is maintained upon an insurance policy issued

entered in the Supreme Court of Ogbomo in a matter of a suit,

In this appeal determine among the matters of a judgment

39T1A. 808

estate of Isaiah S. Isa,

A.

NEMO-CITIZ CITE EXPOSITOR CONTRACT,

a corporation,

SADIQ

"1-30-34

Rec'd. 2 months $7.36 on approval for health form to be signed by insured.

A L B"

Accompanying, and attached to the receipt, as shown by the record and as introduced in evidence by the plaintiff, is a document containing the following statement: "Money paid to an agent after the policy has lapsed will not be credited to the policy by the Company unless application for reinstatement of the policy is made on the form provided by the company, and until said application for reinstatement is approved by the company." On February 1, 1934, Goggin tendered to the defendant company the sum of $3.68, on March 1, 1934, the sum of $7.36, and on April 2, 1934, the sum of $11.04, all of which were refused. Thereafter, and on April 2, 1934, the agent of the defendant company notified Goggin that it would be useless to make any further tender of payments.

It is plaintiff's claim in his brief filed here, that by applying the $7.36 paid to defendant on January 30, 1934, it continued the policy in force up to and including February 1, 1934, that the defendant waived the forfeiture provision of the policy for failure to make prompt payment of premiums, and that, therefore, the requirement that a certificate of health be furnished for the reinstatement of the policy was not only waived by the defendant, but was not required by plaintiff under the law; that the policy being in full force and effect during the month of January, 1934, and the tender by plaintiff of the February premium at a time when the policy was in full force and effect, that, therefore, the refusal of defendant to accept the tender was wrongful; also, that the repeated refusals of defendant to accept further tender of premiums due, and their notice to plaintiff that it was useless to make further tenders of premiums, relieved plaintiff of any obligation to make further efforts to pay the premiums, and did not impair the rights

Dec'd. 3 months (3.2% of shipment for Pacific Coast to be shipped in January.

of the insured under the policy.

Defendant's theory is that the evidence shows that the policy had lapsed for nonpayment of the premium due December 1, 1933, and that one of the two essential conditions precedent to reinstatement of the policy was never performed, in that no evidence of insurability was ever furnished to the defendant, and except for a paid up value of $312.80, the policy was not in force on August 17, 1935, the date of the death of the insured. Defendant also contends that the verdict and judgment are contrary to the manifest weight of the evidence.

On October 7, 1935, and after the death of the insured, plaintiff, on behalf of Mrs. Celia Lee, widow of Louis D. Lee, the insured, wrote a letter to the defendant company, which letter was identified by Goggin and received in evidence, and is, in part, as follows:

> "I received a receipt stating that he should procure a health form and sign it. As the deceased was in Washington, D. C. at the time, and I not being able to contact him, upon reliable advice I appeared at the Company's office to make payments upon policy No. 15783-M, on February 1, 1935, March 1, 1935, and on April 1, 1935, each time accompanied by witnesses. On April 1, 1935, your representative, Mr. J. M. Epstein, informed me that it would be useless for me to appear any more, as he did not intend to accept payment on the above mentioned policy unless the health form was signed."

Plaintiff testified to the effect that at the time he made the payment of $7.36 for which he received the receipt hereinbefore mentioned, he had a book in which receipts for payment of premiums were usually entered, but that the agent of the company, upon receiving this money, declined to enter the payment in this book, but instead gave plaintiff the receipt referred to.

Alec Bloom, an agent for the defendant company at the time of the transactions in question, testified to the effect that he prepared and tendered to Goggin the receipt for the $7.36 above mentioned, at which time a Mr. Michaels, acting assistant manager of

of the insured under the policy.

Determann's theory is that the evidence shows that the policy had lapsed for nonpayment of the premium due December 1, 1922, and that one of the two essential conditions precedent to reinstatement of the policy was never performed, to wit, no evidence of insurability was ever furnished to the defendant, nor receipt for a paid up value of $216.00, the policy now not in force on August 17, 1923, the date of the death of the insured. Determann also contends that the verdict and judgment are contrary to the manifest weight of the evidence.

On October 7, 1923, one Albert the death of the insured, plaintiff, on behalf of Mrs. Sophie Lau, widow of Louis D. Lau, the insured, wrote a letter to the defendant company, which letter was identified by Doggin and received in evidence, and is, in part, as follows:

"I received a receipt stating that he should receive a benefit from said slip it. In the document was in Washington, D. C. on the 21st, and I met Doggin while to another firm, Olsen Williams relative I suppose at the Company's office to make payments upon policy No. 107227, on February 1, 1923, March 1, 1923, and on April 1, 1923, each time accompanied by attorneys. On April 1, 1923, Jens Rasmussen, Mr. L. . Kjaeldin, informed me that it would be useless for me to attempt any more, as he did not intend to accept payment on the above mentioned policy unless the penalty for the same was signed."

Plaintiff testified to the effect that at one time he made the payment of $7.00 for which to covering the remaining premiums mentioned, he had a book in which receipts for payment of premiums are usually entered, but that the clerk of the company, upon receiving this money, declined to enter the payment in this book, but instead gave plaintiff the receipt referred to.

the defendant company, and a Mr. Epstein, cashier for the defendant company, were present; that the witness refused to accept the $7.36 on behalf of the company without evidence of health. This witness further testified that he accepted the $7.36 with the distinct understanding that Goggin, who was handed a health form, would get it signed as evidence that the insured was in good health; that the witness did not apply the $7.36 to the December, 1933, and January, 1934, premiums, and that the money was held in abeyance until such time as Goggin would return the health form; that the witness made a monthly report for December, 1933, and January, 1934, which included this policy, and that in this report he indicated that the policy would be lapsed unless the premium was paid, and that when he made out a report the latter part of December, 1933, the policy had not lapsed.

Julius M. Epstein, cashier of the defendant company in Chicago, testified to the effect that he was present at the Drexel branch of his company when Goggin came to make payments on the Lee policy; that Bloom and a Mr. Michaels were also present.

Michaels, whom Bloom refers to in his testimony, testified that he was also an agent of the defendant company in Chicago, and that he was assistant cashier; that he saw the receipt given to Goggin as hereinbefore referred to, on the date it was given, and that Bloom at that time gave Goggin a health form to be filled out. This witness also testified to the effect that he informed Goggin that he, the witness, was not allowed to accept money unless accompanied by the proof of health, and that if the money was accepted, it could not be applied towards any premiums, unless the health certificate was executed, and that Goggin took the health certificate and said he would return it executed within ten days; that thereafter Goggin came back without the health form and wanted the witness to accept additional money, which "they" refused to do. This witness

also testified that the agents of the company were informed by Mrs. Lee that the insured was in Washington, D. C., and that they sent a health form for him to fill out, but that "we did not ever get the form back."

Without objection, on behalf of defendant, the deposition of John T. Gray was read to the jury. Gray testified, in substance, that he resided in New York, and was employed by the defendant company as supervisor of the monthly premium record section at the time of the transactions in question; that he supervised the making and keeping of home office records pertaining to certain classes of insurance, and that such records were kept by the witness in the regular course of business; that he had examined these records and found that a policy was issued on the life of Louis D. Lee of Chicago, Illinois on February 1, 1927, requiring the payment of a premium of $3.68 monthly on the first day of each month; that on the lapse record of the company kept by the witness, there was an entry as to the Lee policy which was made by the witness. This document was admitted in evidence, and the witness testified concerning it. After stating what the document showed as to the insurance policy in question, he testified that his record showed that it had been reported from the Drexel (Chicago) office in January, 1934, that the last payment collected on the policy was paid to and for the month of November, 1933, and that the premium due December 1, 1933, was never paid. Apparently without objection, this witness testified that he found a notation on another document which was received in evidence, that during the month of July they received from the Chicago office a notification to the effect that this office was holding two monthly premiums on the policy involved for the months of December, 1933, and January, 1934, and that they were sending these collections to the home office. Also, apparently without objection, he was

get the vote back."

permitted to testify as to the meaning of another document, which the witness stated showed that the premiums paid after the month of November, 1933, were held provisionally, and that no premiums were paid subsequent to the premium paid for the month of January, 1934, which was accepted provisionally, and that the policy in question, as shown by the records of the company, was not in force on August 17, 1935, the date of the death of the insured. He also testified to the effect that after the lapse of this policy for nonpayment of monthly premium due December 1, 1933, the liability of the policy in question was carried in the form of paid up insurance, as provided by the policy provisions, for a reduced amount of $180.80, and that this policy, therefore, had a value of this amount, plus $32.00, the value of the additional paid up insurance purchased by the policy dividends, which made a total of $212.80.

The record indicates that this amount, to-wit: $212.80, was tendered to the plaintiff, and that he refused to accept it. The death certificate indicates that the insured died of cancer.

In Broughton v. Equitable Life Assur. Soc. of U. S., 71 Fed. (2) 831, in the Circuit Court of Appeals for the Fifth District, on appeal from the District Court of the United States for the Southern District of Florida, a policy of insurance had lapsed for failure to pay a quarterly premium of $16.45, due August 8, 1931. This policy contained the usual provision for grace of 31 days for the payment of premiums. On October 5, 1931, after the grace period had expired, the insured wrote to the general agent of the company stating that he had neglected to pay the premium due on August 8, 1931, and enclosed a check for $17.45. The policy contained the provision that "if this policy shall lapse in consequence of nonpayment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the Society, and the payment of all

overdue premiums, with interest at 5% per annum." The agent cashed the check and the proceeds were held in a "suspense account." On October 9, 1931, the agent wrote to the insured, enclosing a receipt for the money and a form of application for reinstatement, which included a health declaration, and advised the insured that a satisfactory health declaration was required for reinstatement of his policy. The insured executed the application and returned it, and did nothing further. The application for reinstatement, among other things, contained the following:

> "I hereby certify that I am in good health; that except as stated below, I have had no illness, have not consulted any physician or practitioner, have not been a patient in any hospital or sanitarium, and that there has been no change in the health record of my family, since the issuance of the policy.
>
> "I hereby agree that if the above numbered policy is reinstated by the Society, such reinstatement shall be based upon the good faith of this declaration, which is personally signed by me; and that the reinstatement if granted shall not take effect until all premiums in arrears, with interest, have been duly paid during my continued good health.
>
> "Note here any exceptions, including dates and complete details.
>
> "Dated at Minneapolis, Minn. Oct. 12, 1931. B. I. 419-29-2.
>
> "(Signature of Insured)
> "James W. Broughton."

Broughton died on November 17, 1931, and his widow brought suit against the company to recover the sum of $5,000.00, the amount of the policy, after the company had declined payment and sent its check to return the amount Broughton had paid. This check was received, but was not cashed, and later the amount of the check was tendered in court. Upon a trial, the finding was for the defendant insurance company, and in sustaining the judgment of the trial court, the United States Court of Appeals said:

> "After the policy lapsed, the insured was not entitled to have it reinstated by merely executing a health certificate, although on a form sent him for that purpose, and tendering the premium. The contract plainly provided that the evidence of good health should be satisfactory to the company. Until evidence of

insurability was furnished and accepted the policy was not reinstated. The receipt given him for the check he had tendered in payment clearly indicated that the money was received tentatively to be held in trust until he should comply with the provisions of the policy. There was nothing in the previous course of business between the parties nor in the receipt or application for reinstatement that could lead a reasonable man to believe that the provision of the policy requiring that the evidence of insurability should be satisfactory to the company would be waived. The case of Hartford Life & A. Ins. Co. v. Unsell, 144 U. S. 439, 12 S. Ct. 671, 36 L. Ed. 496, relied upon by appellant, is not in point. Cf., Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252, 26 L. Ed. 765, therein cited. Estoppel is not shown.

"The situation presented was practically the same as if the company had denied issuing the policy. The reinstatement of the policy was in effect a new contract. The burden was on plaintiff to prove that everything necessary to reinstate the policy had been done by the assured before there could be a recovery upon it. This included proof that the health certificate furnished had been accepted as satisfactory evidence of insurability and the check sent had been credited to payment of the overdue premium. Appellant failed to sustain this burden. This conclusion finds support in the following well-considered cases. Kennedy v. Grand Fraternity, 36 Mont. 325, 92 P. 971, 25 L.R.A. (N.S.) 78; Equitable Life Assurance Society of United States v. Pettid, 40 Ariz. 239, 11 P. (2d) 833; Rome Industrial Ins. Co. v. Eidson, 142 Ga. 253, 82 S. E. 641; Lane v. Fidelity Mut. Ins. Co. 142 N. C. 55, 54 S. E. 854, 115 Am. St. Rep. 729."

While the record in the instant case indicates that the agent of the defendant company made unsuccessful efforts to reach the insured in Washington, D. C., there is nothing in the record to indicate that the plaintiff, or the wife of the insured, made any effort whatever to procure the execution of the certificate required for reinstatement, and the fact remains that it was never executed and never returned to defendant. Goggin testified that Lee returned to Chicago about the middle of the summer of 1935, and that his death occurred in this city. From the entire record, we can arrive at no other conclusion than that there is no issue of fact involved here, and that the trial court was in error in failing to instruct the jury to find the issues for the defendant. The judgment of the Municipal Court of Chicago, is therefore, reversed, and it is the order of this court that judgment be entered here for plaintiff and against defendant for the sum of $212.80, due under the terms of the policy, and against plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT FOR PLAINTIFF FOR $212.80 AND AGAINST PLAINTIFF FOR COSTS.

HEBEL, P.J. and DENIS E. SULLIVAN, J. CONCUR.

39629

CHICAGO TITLE & TRUST COMPANY, a corporation,

Appellee,

v.

HARVEY M. ANDERSON, et al.,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

294 I.A. 608

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On January 15, 1934, the Chicago Title & Trust Company, under the terms of a deed of trust to real estate, filed a bill to foreclose. The trust deed was given to secure an indebtedness of $6,500.00, as evidenced by a principal note for that amount, dated September 30, 1929, and due five years after date. There is no question raised as to the amount alleged to be due. The trust deed, principal note and a number of interest coupon notes were executed by Harvey M. Anderson and Mabel A. Anderson, his wife. The principal and interest notes were made payable to bearer.

On September 17, 1934, by leave of court, an intervening petition was filed in the cause by Anderson & Lind Manufacturing Company, in which it is alleged, among other things, that Harvey M. Anderson and Mabel A. Anderson, being indebted to the Anderson & Lind Manufacturing Company, executed and delivered the promissory note in question, together with the trust deed, to the intervening petitioner; that B. G. Anderson was at that time director, secretary and treasurer of the intervenor, and that B. G. Anderson, on March 2, 1931, removed from the vaults of the intervenor the trust deed, principal note, together with the interest coupons; that thereafter on March 2, 1931, B. G. Anderson delivered the trust deed, the principal note and eight interest coupon notes to Defrees, Buckingham, Jones & Hoffman, as collateral for amounts due one W. W. McMillan, and on a first

mortgage on the Laramie State Bank Building held by the Chicago Title & Trust Company;" that on March 2, 1931, the intervenor was the owner of the trust deed and notes described, and that the intervenor received no consideration for the trust deed and notes, that B. G. Anderson had no legal right or authority to transfer, assign or deliver these documents to any person without consideration to the intervenor, and that B.G. Anderson had no right to pledge the property as collateral either for himself or for the Laramie State Bank of Chicago, and that the intervenor had no knowledge that the property had been so unlawfully transferred until August 15, 1933. The intervenor further alleges that the delivery of the notes and trust deed by Harvey M. Anderson and Mabel A. Anderson, his wife, to the intervenor, was made upon the express understanding that the deed and note were not to be disposed of, and that no payments of principal or interest thereon were to be required until business in the building industry had become normal, and further, that no foreclosure proceedings would be instituted by the Anderson & Lind Manufacturing Company unless default in the terms of the provisions of the trust deed should occur subsequent to a time when the conditions in the building industry became normal. In this intervening petition, petitioner prayed that the trust deed and note be decreed to be the property of the intervening petitioner. The answer of plaintiff to the intervening petition is that it had no knowledge, sufficiant to form a belief, that the intervening petitioner owned the trust deed and notes.

Joint and several answers to the complaint were filed on behalf of certain minors by their guardian ad litem. The matter was referred to a special commissioner to take proofs on the issues made. On the commissioner's report, and after objections and exceptions had

B.G.

been made thereto, and a hearing had thereon, on February 6, 1937, the court entered a decree dismissing the intervening petition and ordered that the real property be sold, as prayed in the complaint. The appeal is from this decree.

Prior to the events hereinafter referred to, the notes and trust deed in question remained in the possession of the Anderson & Lind Manufacturing Company. In the year 1931, B. G. Anderson, secretary and treasurer of the Anderson & Lind Manufacturing Company, was indebted to one W. W. McMillan, and early in that year, Donald Defrees, one of the attorneys for the complainant here, asked Anderson to make a payment on this obligation to McMillan, or to put up something in the way of collateral. On March 2, 1931, in the presence of L. G. Anderson, president of the Anderson & Lind Manufacturing Company, B. G. Anderson delivered to Defrees the principal note, interest coupons and trust deed involved here, as collateral. The record also indicates that prior to the maturity of the principal note, and for a valuable consideration, the note, trust deed and mortgage were conveyed by McMillan to the Chicago Title & Trust Company, plaintiff here.

When cross examined as a witness, L. G. Anderson admitted that he had accompanied his brother, B. G. Anderson, to the office of Mr. Defrees, and that his brother delivered the documents referred to, to Defrees, in his presence, but insisted that he did not know at the time what the papers were that his brother, B. G. Anderson, handed to Defrees, and that he thought, that whatever the documents were, they belonged to his brother. The evidence clearly indicates that at this time, and in the presence of L. G. Anderson, Defrees gave B. G. Anderson a receipt for these documents.

B. G. Anderson, secretary and treasurer of the Anderson & Lind Manufacturing Company, testified that he had entire charge

of notes and mortgages, the property of the Anderson & Lind Manufacturing Company, including those in question, and that he had previously sold many thousands of dollars worth of these securities, presumably with the consent of the intervenor. This is not denied.

L. G. Anderson, the president of the intervening corporation, admitted that, at times, he was in the office of Mr. Defrees when his brother, B. G. Anderson, attempted to sell certain of these securities to Mr. Defrees, but he insisted that he heard no such offer at the time when the note and mortgage in question were delivered to Defrees. This witness further testified that the intervening corporation did not deem it necessary that a resolution of the directors of the corporation be adopted in order to give B. G. Anderson the authority to sell the securities of the intervenor. He admitted that he talked with B. G. Anderson over the matter of the delivery of the note and mortgage in question to Defrees, but insisted that it was after they had been delivered.

Metellus Thomson, Jr., a lawyer connected with the firm of Defrees, Buckingham, Jones & Hoffman, testified to the effect that on the day when the documents in question were delivered by B. G. Anderson to Mr. Defrees, he, the witness, was called into Mr. Defrees' office, and that L. G. Anderson and B. G. Anderson were there, and that these persons stated, in substance that they were giving these documents to Mr. Defrees as collateral security in the Laramie Trust - McMillan matter. This witness further testified that he dictated the receipt for the documents in his office, and that B. G. Anderson and L. G. Anderson were both present at the time of the delivery of the receipt.

After a careful examination of the testimony, we can arrive at no other conclusion than that the intervening corporation,

through its president, consented to the delivery of these securities to Mr. Defrees, and for the purpose mentioned in the receipt given to B. G. Anderson, which recites that the documents were delivered as collateral for the debt of B. G. Anderson to McMillan. The corporation had apparently made B. G. Anderson its agent to sell its securities.

Section 79, chapter 98 of the Negotiable Instruments Act, Illinois State Bar Stats. 1937, provides that:

> "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

It is clear that the plaintiff here, the Chicago Title & Trust Company, acquired the interest of McMillan in the securities in question for a valuable consideration and prior to the maturity of the principal note. This seems not to be disputed by the intervenor.

In Mann v. Merchants' Loan and Trust Co., 100 Ill. App. 224, the Merchants' Loan and Trust Company brought suit to foreclose a trust deed given to secure a loan of $5,000.00 dated May 12, 1892, and signed by John Picalek. Shortly after the note was executed and delivered, it was purchased by Nicholas Mann, the plaintiff in that case, from one Schintz, who made the loan originally to Picalek. Mann kept the note and mortgage in his possession until a few days before its maturity, when he turned them over to Schintz for collection. Immediately thereafter Schintz took the note and mortgage to the Merchants' Loan and Trust Company and there hypothecated them as security for a loan. In the foreclosure proceeding, Mann, the defendant, filed a cross bill to foreclose the same trust deed, claiming to be the owner of the note.

From a decree finding title in the Merchants' Loan and Trust Company, the assignee of the note, appeal was taken to this court, and in affirming the decree, this court said:

"The assignment of a note secured by mortgage carries the security with it. Pardee v. Lindley, 31 Ill. 174; Hamilton v. Lubukee, 57 Ill. 415-419; Keohane v. Smith, 97 Ill. 156; Mullanphy Savings Bank v. Schott, 135 Ill. 655; Curtis v. Humble, 57 Ill. App. 513; Humble v. Curtis, 160 Ill. 193.***

"It has long been the settled law in Illinois that the bona fide assignee of notes secured by trust deed thereby acquires the security, subject, only, to equities of the mortgagor and not subject to latent equities of other parties of which he has no notice. Olds v. Cummings, 31 Ill. 188-194; Schreeves v. Allen, 79 Ill. 553-555; Silverman v. Bullock, 98 Ill. 11; Mullanphy Savings Bank v. Schott, 135 Ill. 655; Himod v. Gilman, 147 Ill. 293-301; Humble v. Curtis, 160 Ill. 193. See also Murry v. Lyburn, 2 John Ch. 441. * * *

"In the present case it is undisputed that Schintz in the first instance obtained the note bona fide for value; that he sold it to Mann in the same way. The maker of the note does not dispute the validity of either note or mortgage. The contest here is between a party, once a bona fide holder for value, who voluntarily gave possession of note and mortgage to Schintz for value before maturity, and a party who, bona fide for value, before maturity, received the note and mortgage from Schintz and still holds the same.

The question is not at all as to the assignability of a mortgage. The ownership of the note carries with it the security; it will hardly be contended that appellant is entitled to foreclose the mortgage and receive the benefit thereof while appellee may recover judgment on the note.***

"Possession of a negotiable note indorsed in blank is prima facie evidence of title, and the holder of such instrument is presumed to have taken it in good faith, for value, before maturity, in the usual course of business and without notice. Fourth Am. & Eng. Ency. of Law, 2d Ed., 318; Oisne v. Chidester, 85 Ill. 523-524; Cook v. Norwood, 106 Ill. 558-562; Bemis v. Horner, 165 Ill. 347-352-353; Same v. Same, 62 Ill. App. 382; Comstock v. Hannah, 76 Ill. 530; Matson v. Ally, 141 Ill. 284-287; 1st Smith's Leading Cases, 780; Metcalf, Receiver v. Draper 98 Ill. App. 398.***

Appellant gave Schintz the opportunity to commit the fraud of which he was guilty. Appellant is an innocent party; so is appellee; under these circumstances, upon the party who placed in Schintz' possession the means whereby he was enabledto perpetrate a fraud, must fall the loss occasioned thereby."

In its reply brief, the intervenor tacitly admits that the plaintiff here received the note in question in due course, but insists that the note and trust deed were received by Defrees merely as a pledge, and that, therefore, the pledgee did not acquire title,

but held the paper to the extent of his lien only, and cites the case of Peacock v. Phillips, 247 Ill. 467, which plaintiff also cites in its brief. In that case, among other things, the Supreme Court said:

> "If the securities of a third person are deposited as collateral, the creditor may collect the whole amount due from the maker and will hold any surplus above his own debt as trustee for his debtor, and in such a case the maker of the securities is not concerned how the pledgor and pledgee should settle between themselves but is held for the full amount of his debt. (Tooke v. Newman, 75 Ill. 215.)"

We find nothing in the petition which suggests that plaintiff should render an accounting to the intervenor in case the property is sold for more than the amount due from B. G. Anderson to McMillan. In fact, there is nothing in the record which suggests what Anderson's indebtedness to McMillan amounted to. If, however, that question should arise, it is for the court to pass upon it when it is presented.

We are of the opinion that the court was correct in entering the decree appealed from. It is, therefore, the order of this court that the decree of the Superior Court of Cook County be affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39643

ANDREW DOLEJS,

Appellee,

v.

LIETUVA BUILDING AND LOAN ASSOCIATION, a corporation, etc.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

33 B-A

294 I.A. 608 4

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in the Municipal Court of Chicago against defendant, based upon the alleged unlawful conversion by the defendant of certain personal property of plaintiff. After a trial before the court and a jury, and upon the verdict of a jury, the court, on April 7, 1937, entered the judgment against defendant for the sum of $800.00.

From the statement of defendant, which is not denied, we arrive at the conclusion that at the time of the alleged conversion, the personal property involved was in a building formerly owned by plaintiff; that a mortgage held by defendant on the real estate had been foreclosed, and that the period of redemption had expired some days before the plaintiff was called upon to and did voluntarily surrender the possession of and vacate the premises. In the brief filed here, plaintiff does not take issue with this statement. It also appears from the record that the surrender of the premises by plaintiff took place in December, 1931, and that prior thereto, the premises had been in the possession of a caretaker; that this caretaker surrendered the possession of the premises to plaintiff just prior to plaintiff's giving up possession to defendant, and that on December 20, 1931, the caretaker gave the keys of the building on the premises in question to the plaintiff.

From plaintiff's testimony it appears that after the keys of the building in question were given to him by the caretaker, plaintiff went to the premises and checked over all the articles of

2374 I.A. 60¢

personal property belonging to him, and made an inventory thereof; that he returned to the premises the next day, and that the building was closed and a new lock had been placed upon the door thereof; that at that time he said to a man named Michelovick, "Why do you close me out?" and that Michelovick said, "We bought the building and put a lock on", and that plaintiff said to him, "I want my fixtures;" that Michelovick replied to plaintiff, "Maybe some customer will take the fixtures with the building and saloon", and that plaintiff replied, "All right, if you people want to put a restaurant or be responsible or give a lease on the building, all right, or I want my fixtures back." What Michelovick's connection with the matter was, or whose agent he was, if he was an agent, does not appear from the record. Plaintiff also testified that at that time, in the presence of Michelovick, he, plaintiff, took away his trunk and that he voluntarily left the remainder of the furniture in the building, and that he subsequently want to see Michelovick "at the building and loan fifteen or twenty times" about this furniture. On cross examination, plaintiff testified that at the time the place was vacated by the caretaker, "I could have removed the fixtures. I had the keys." What disposition was made of this property does not appear from the record.

Nothing further seems to have transpired between the parties until November, 1932, at which time plaintiff wrote the defendant a letter, in which he stated, "Would like to know what you intend to do about my fixtures at 2301 22nd Place. If you want to buy them, let me know and I will come to the office to close the deal."

There is not one word in the record which indicates, or tends to indicate that this defendant ever had possession of the furniture and fixtures in question. Therefore, there is nothing to support the verdict and judgment. The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39653

RICHARD O. MAZER,

(Plaintiff) Appellee,

v.

CONSUMERS COMPANY, a corporation, and CLARENCE ANDERSON,

(Defendants) Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

294 I.A. 609

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On December 29, 1933, at about 11 o'clock in the morning plaintiff was injured by being struck by an automobile driven by defendant's agent, while walking eastward on a two lane highway on Gunnison Street between Harlem and Nagle Avenues in the township of Norwood Park in Cook County, Illinois, and sues for the damages sustained. The cause was submitted to a jury, which returned a verdict in favor of plaintiff in the sum of $5,000.00, upon which judgment was entered. This is an appeal from that judgment. No question is raised as to the amount of the judgment. The action as to Anderson was dismissed.

Plaintiff testified to the effect that he was of the age of 67 years, and that on the morning in question, and just prior to being struck, he with a friend, was walking east on Gunnison Street on the south side of the highway; that the place where he entered Gunnison Street is about one mile east of Harlem Avenue, and that Nagle Avenue, the street toward which he was proceeding, is about 1100 feet from the point where he entered Gunnison Street; that at the time and place in question, the temperature was below freezing, and that the highway was covered with ice and that it was slippery; that at the time he started walking east along on the south side of the roadway, he looked west and saw a car coming from the west toward him over the top of a hill about 600 feet away, that he did not look around again after he saw the car on the hill, and that its speed was then from 40 to 45 miles an hour; that at that moment, realizing that under the conditions he might be in danger from the approaching

39632

RICHARD C. BACON,

(Plaintiff) Appellee,

v.

JOHNSTOWN CONCRETE & CONSTRUCTION
and CHARLES ARMSTRONG,

(Defendants) Appellants.

2941A.609

On December 26, 1923, at about 11 o'clock in the morning plaintiff was injured by being struck by an automobile driven by defendant's agent, while riding mounted on a two time highway between Dunnion street between Berlin and Maple avenues in the township of Norwood for in Rock County, Illinois, and more for the damages sustained. The cause was submitted to a jury, which returned a verdict in favor of plaintiff in the sum of $8,000.00, upon which judgment was entered. This is an appeal from that judgment. No question is raised as to the amount of the judgment. The action as to ~~Johnson~~ was dismissed.

Plaintiff testified to the effect that he was of the age of 27 years, and that on the morning in question, and just prior to being struck, he with a friend, was riding over on Dunnion street on the south side of the highway; that the place where he entered Maple avenue, the street towards which he was proceeding, is about 1100 feet from the point where he entered Dunnion street; that at the time and place in question, the temperature was below freezing, and that the highway was covered with ice and that it was slippery; that at the time he started riding along on the south side of the roadway, he looked west and saw a car coming from the west [illegible] him over the top of a hill about 600 feet away, that he did not look around again after he saw the car on the hill, and that its speed was then from 40 to 45 miles an hour; that it came from the [illegible] that under the conditions as they [illegible]

automobile, he walked across the highway in a northeasterly direction to the north side of the paved highway, and that after crossing the highway, "I was going straight east right along the slab. I did not hear any noise other than the purr of the car which I heard back of me when I walked across. I did not hear a horn. My hearing was good. No horn was sounded. When I saw the automobile coming directly towards me, it was just like a flash. I don't remember whether I was on the pavement when I was picked up, but I think I was off the pavement." Plaintiff further testified to the effect that in his opinion, he walked about 45 feet from the time he left the south side of the street until he was struck, and that he walked north east in a diagonal direction; that he saw the car which struck him, and that it was then about 10 feet away from him; that after he was struck, he was on the north side of the highway near the concrete. Plaintiff further testified to the effect that just before the car struck him, it was going from 20 to 25 miles an hour, and that "it then seemed to be going kind of sideways with the back wheels off the cement."

A police officer testified that he arrived at the scene of the accident shortly after 11 o'clock on the morning in question; that the scene of the accident was pointed out to him, and that he noticed marks of the automobile; that "I saw skid marks on the highway and traced them from where they commenced to where they ended. The marks started about a block from the hill going sideways northeast for about 50 or 60 feet, and stopped 8 or 10 feet off the pavement on the north side of the street. These marks started about 4 feet from the south edge of the concrete. The car was coming east and the marks started in a northeasterly direction. These marks started about 4 feet north of the south edge of the pavement. It was a 30 foot pavement." This witness further testified to the effect that

at the time in question, he picked up the strap of a wrist watch which belonged to the plaintiff, which was then about 12 feet north of the concrete pavement.

A resident of the neighborhood who lived on Gunnison Street, near the point where the accident in question happened, testified to the effect that near the point in question, he had a mail box standing on December 29, 1933, and that after the accident, on December 30, 1933, it was lying on the ground, and the box was dented in and broken off at the stump.

Another witness testified to the effect that shortly after the accident, he drove to the point thereof and saw a mail box which had been knocked over, that an automobile had skidded into it, and that "it looked like a car had been turned sideways and skidded down the hill. The skid marks commenced about 75 feet from the mail box, which was completely knocked off from the supports."

The driver of the car which caused the accident, testified to the effect that he turned in on Gunnison Road at Harlem Avenue about three quarters of a mile west of the place of the accident; that when he arrived at the hill, he noticed two men walking along the right side of the road, and that while he was on top of the hill, he honked his horn and slowed down, as he was coming down a hill; that when he got to within 15 feet from the plaintiff, plaintiff started walking across the road; that when the witness got to the top of the hill, he was traveling about 20 to 25 miles an hour and was on the right side of the road about 8 feet from the south edge; that the two men were walking side by side along the right edge, and that they were about 400 to 500 feet in front of him when he saw them; that when he got within 200 feet of them, he slowed down, and that as he came down the hill, he edged away from the side of the road to give the pedestrians a little room, and that he was then

of the concrete pavement.

A resident at the neighborhood can limit on Dunstan itself
ation belonged to the plaintiff, which was like about 12 feet north
at the time in question, be driven to the stop at a point

4 or 5 feet from the south edge of the road, which put the left wheels of his car in about the center of the street; that when the witness was about 15 feet from the plaintiff, plaintiff started walking directly across in front of him, looking straight ahead, and that at that time, he, the witness, was traveling about 15 miles an hour, and that when his car was about 4 or 5 feet north of plaintiff, plaintiff started to walk across the street; that the witness then slammed on his brakes and twisted his wheel to the left, which would be toward the north, and that the car kept going sideways on an angle until he hit the plaintiff in the center of the road; that the plaintiff was about in the middle of the road when the car first came in contact with him; that the right front part of the bumper hit plaintiff right below the knee, and that his body caromed against the headlight; that the car went to the north edge of the pavement and stopped; that plaintiff was on the right front fender at that time, and that when the car stopped, plaintiff dropped off in front of the bumper, and was then on the north edge of the concrete; that when the car stopped, the right front wheel was just off the concrete, and the left front wheel was about 2 or 3 feet off on that angle, and both rear wheels were on the pavement. This witness further testified to the effect that his car traveled about 35 feet from the time he first saw that plaintiff was crossing the street until it came to a stop, and that it was going in a northeasterly direction. He also testified that there were some skid marks about 35 feet long.

Among the grounds urged by defendant for the reversal of the judgment are that the verdict of the jury was manifestly against the weight of the evidence, and that the evidence clearly shows that the plaintiff was guilty of contributory negligence. A review of the evidence convinces us that defendant's contention in

this regard is without merit. The evidence of the plaintiff and the witnesses produced by him indicate that at the time he was struck by defendant's automobile, he was walking east near the north edge of the pavement, and that the defendant's car skidded in a northeasterly direction across the entire width of the north half of the paved surface of the highway, and struck both the plaintiff and a mail box, which was standing north of the north edge of the pavement, about two feet therefrom, and crushed it to the ground. The evidence also indicates that the strap of plaintiff's wrist watch was picked up by a police officer some distance north of this. The police officer stated that he estimated the skid marks to be 75 feet in length. It is true that Anderson, the driver, testified that plaintiff turned from the south directly in front of his car when the car was straddling the middle of the pavement, but in this he is not corroborated. However, the questions of fact presented on these phases of the case were for the jury to pass upon, and we are not inclined to interfere.

Defendant insists that prejudicial error was committed by the plaintiff in attempting to indicate to the jury that an insurance company was involved. On cross examination of the plaintiff, in an effort to determine whether or not plaintiff had suffered a previous injury, plaintiff was asked the following questions by counsel for defendant:

"Q. You were in an automobile accident some six years ago and this same leg was injured? A. No, sir.
Q. Do you remember Doctor Burrowes coming out to see you in the hospital? A. Who?
Q. Dr. Burrowes, some time after the accident [the accident here in question]. You don't remember when he came to see you at all? A. No."

Plaintiff was then asked whether a Dr. Burrowes came out to see him on January 4, 1934, after the accident involved here, and the witness answered: "I don't remember that there was any doctor out to see me. There was a couple of fellows from the insurance company out there,

I think they were. That is about all I can remember of. Whether there was a doctor or not, I don't believe there was." Thereupon, counsel for the defendant moved that a juror be withdrawn and the jury dismissed because of the plaintiff's reference to insurance.

In Williams v. Consumers Co., 352 Ill. 51, a similar situation was presented, and in passing upon this question, after reviewing the cases cited, the Supreme Court said:

> "We have examined these cases but find none where a mis-trial has ever been granted on account of an inadvertent or unresponsive answer of a witness to a legitimate inquiry. Generally, where prejudicial error has been declared it is found to have been due to some misconduct or improper remarks or questions of counsel, oft-times repeated, and calculated to influence or prejudice the jury."

In the instant case, the answer of the witness was made in response to a question propounded to him by counsel for defendant as to whether or not a certain doctor had been to see him, and his answer was in the negative, he, stating that only two persons had been to see him and that they represented themselves to be from some insurance company. We find nothing in this answer to justify a reversal.

It is insisted that the judgment should be reversed because of the fact that plaintiff gave an instruction which recited in some considerable detail the charges made in the declaration, and cites the case of Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, where a similar instruction was offered by the plaintiff. While the court, in that case, criticised such an instruction, it is to be noted that the judgment there was not reversed. Defendant also cites the case of Smoot v. Hollingsworth, 265 Ill. App. 447, on the same proposition, and while the court again criticised the instruction, it will also be noted that in that case it also did not reverse the judgment. While

I think they were. That is about all I can recollect at present.

Cross-examined by Mr. Justice Darling:

In Williams v. Spencer &c., Vol. III. 61, a similar question was examined, and it was held that evidence, after having the cards filed, the following Court held:

[illegible] have ever been treated on account of an inadequacy or unreasonable amount of a witness to a [illegible] Generally, where preliminary error has been obtained it is found to give rise to some disadvantage or [illegible] or question of credit, mis-steps [illegible], and otherwise to influence or prejudice the jury.

In the latest case, the answer of the witness was held to constitute a question proposed to him by counsel for defendant as to whether or not a certain doctor had been to see him, and his answer was in the negative. He, stating that only two persons had been in the room and that they represented themselves to be from some insurance company. He find nothing in this answer to justify a reversal.

It is therefore that the judgment should be reversed because of the fact that plaintiff gave an intentional voice evidence to make a similar impression was offered by the plaintiff. Unlike the case, the case of Bailey v. Midland Great Western Co., 20 Ir. 407, where considerable delay the charges made it the information, and other in that case, difficulty such as insurance, it is to be noted that the judgment there was not reversed. Chairman [illegible] the view of Deasy v. Mullingsworth, 101 Ir. Ch. 447, as the most reasonable, and while the exact light attached the instructions, in all cases we cannot find in here sufficient [illegible] the judgment.

we are of the opinion that the instruction is objectionable, still, we hold that under the circumstances, and in view of the record here, the giving of it is not sufficient ground for reversal.

After a careful examination of the entire record, we conclude that the defendant had a fair trial, and that we would not be justified in disturbing the verdict. The judgment of the Superior Court is, therefore, affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39683

GENERAL INSURANCE AGENCY, INC., a corporation,

(Petitioner) Appellant,

v.

AJAX MOTOR SERVICE, INC., a corporation,

(Respondent) Appellee.

PETITION FOR LEAVE TO APPEAL FROM MUNICIPAL COURT OF CHICAGO.

294 I.A. 609

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On March 6, 1936, judgment was entered against defendant, in the Municipal Court of Chicago on a judgment note for the sum of $3,941.05 The note was signed as follows: "Ajax Motor Service, Inc. (Corporate Seal) Attest: Joseph Frye, Pres., No. . . Due Ajax Motor Service, Inc., by H. C. Mettam, Secretary." Thereafter, on March 25, 1936, defendant entered a motion to vacate and set aside the judgment, that the judgment be opened and leave given defendant to make a defense, and that the judgment stand as security. Thereafter, on April 1, 1936, the court entered an order to the effect that the action be changed "from contract confession to contract" and that a rule be entered on plaintiff to file an amended statement of claim, and on August 31, 1936, the amended statement of claim was filed. In this amended statement of claim, the judgment note in question is set forth in full, and defendant is given credit for certain payments made thereon. To this amended statement of claim, defendant filed an affidavit of defense, in which it is alleged that the president of the defendant corporation who executed the note in question, was not authorized to execute it; that the defendant was induced by fraud and misrepresentation on the part of W. R. Hummel, secretary of the plaintiff, to execute a blank judgment note to the plaintiff without consideration; that Hummel fraudulently stated to Frye, the president of defendant corporation,

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that plaintiff merely wanted the note as a matter of form, and that plaintiff would not confess judgment on the note, and that subsequently Hummel filled out the body of the note. The affidavit of merits further recites that the defendant is not indebted to the plaintiff in any sum whatever. The cause was submitted to a jury, which, on April 13, 1937, returned a verdict in favor of plaintiff for the sum of $3,660.29. Shortly after the verdict, defendant entered a motion for a new trial, which was overruled, and judgment entered on the verdict. Thereafter, the judgment was vacated and a new trial granted. This is an appeal from the order granting a new trial.

W. R. Hummel testified to the effect that on January 28, 1936, the date of the note in question, he was secretary of the General Insurance Agency, Inc.; that on that date, he called at the office of the Ajax Motor Service to see Joseph Frye, president of the defendant company, and there informed Frye that the Ajax Motor Service owed plaintiff a sum of money, and that Frye stated that he could not pay, and that the witness stated to Frye that in view of the fact that "they" being plaintiff's agents, were obligated to the insurance companies which "they" represented, for premiums, and that "they" had to have something to protect themselves, and that Frye then stated that he could pay $300.00 on his account. The witness then told Frye that he would have to have a note for the balance, and that Frye answered, "All right, you make out the note and I will get the check"; that Frye then sat down at his desk and signed the note and gave the witness a check for $300.00, and that the note, which was introduced in evidence, appeared to be exactly the same as when Frye signed it. The witness identified an endorsement made on the back of the note, indicating a payment of $75.00 thereon, on February 10, 1936. On cross examination, this witness testified to the effect that the amount represented by the note was on account

of "liability and property damage of the company's trucks, based on a percentage of the gross receipts, reported monthly, and that is the customary form of insurance. I have a memorandum showing how I arrived at the sum of $3,729.07. I got the figures from the audit report made by Atwel-Vogel. Mr. Frye has a copy of the report. He got it from me the same day the note was signed. It showed a complete audit according to the figures I just gave you."

The auditor and vice president of the defendant company was produced as a witness by plaintiff. He testified to the effect that the Ajax Motor Service had business dealings with the General Insurance Agency, and that the General Insurance Agency had procured and had issued to defendant, various policies for workmen's compensation, public liability, property damage and cargo insurance, and that all of the premiums were paid to the General Insurance Agency, plaintiff. On cross examination, he testified to the effect that he was present in the office of the defendant company when Hummel was there, and that he had no recollection of a directors' meeting which authorized Frye, as president, to sign the note. On redirect examination, he testified to the effect that at the date of the making of the note, there was about $4,000.00 due from the defendant company on account of the insurance referred to.

Henry C. Mettam, who, with Frye, signed the note in question, was called as a witness by plaintiff, and testified to the effect that on the date of the note, he was secretary of the defendant corporation, and that his signature is contained on the document, together with that of Frye, president of the corporation, with whose signature the witness was familiar; that he saw Frye give Hummel, of the plaintiff company, the note in question; that he had a conversation with Frye prior to the date of the note, and that he and Frye discussed what they were going to do about paying the money owed to

the General Insurance Agency, and that it was determined that "they" would pay what they could, compromise on a note and make arrangements to pay off the note weekly or monthly, or as "they" could afford to pay it; that after the execution of the note, the witness saw Hummel at the office of plaintiff and that he countersigned the note and placed the seal of the defendant corporation on it, and that this was done approximately three of four days after Frye had signed the note; that the witness made arrangements with Hummel that "we" would try to pay him $75.00 a week because "they" could not afford to pay more; that prior thereto, there had been numerous conversations about the indebtedness to plaintiff, and that Frye wanted to know from the witness how "we" could settle so that Hummel would not close down on "them", and that Frye left it to the witness to make terms with Hummel as to how the note should be paid off. The note was then introduced in evidence, over the objection of defendant.

Joseph Frye, the president of the defendant corporation and one of the makers of the note in question, testified to the effect that on the date of the note, Hummel presented it to the witness and suggested that the witness sign it, which he did, in blank, that the note was not filled out at the time, and that at that time, Mettam's name was not on it, that he did not know who wrote the words, Ajax Motor Service, Inc., above his signature, that his board of directors had not authorized him to sign the note, and that he did not put the seal on it. The witness admitted that the defendant company owed to insurance companies the sum of $3,729.07 on the date of the note, but claimed that the defendant company did not owe the money to plaintiff.

From the record, we conclude that the plaintiff company was an insurance agency, representing various insurance companies which had issued insurance policies for and on behalf of the defendant

corporation, and that plaintiff considered itself to be and apparently was liable to its principals for the premiums due the various insurance companies on account of these policies. Defendant admits that it was indebted on account of these policies, and further tacitly admitted its indebtedness to plaintiff on account thereof when it executed and delivered the note in question, and at the same time paid $300.00 on account of the indebtedness.

A written second motion for a new trial (not verified) was filed in the cause and there, for the first time, it is urged that plaintiffs, being merely agents of various insurance companies from whom defendants procured the insurance which is the basis of this litigation, were not general agents, but were merely brokers, and were not authorized to collect premiums on account of such insurance. No such defense was presented in their affidavit of defense upon which the case was submitted to the jury. The record seems to indicate that all the dealings as to insurance were had between the plaintiff and defendant, and as stated, that all previous payments for insurance had been made by defendant to the plaintiff, and not to the insurance companies. Plaintiff's representative, through whom the business was transacted with defendant, testified to the effect that under their arrangement with the various insurance companies represented by them, they became liable to account for all premiums due on insurance. Also, as stated, this situation seems to have been recognized by defendant at the time the note was given and the $300.00 paid, and from the fact that defendant had previously paid all of the premiums due on insurance to the plaintiff, we condlude that the new issue presented by the last motion for a new trial is without merit. The whole matter was submitted to a jury, which returned a verdict

for the plaintiff, and we can find nothingin the record which justified the court in granting a new trial. Therefore, the judgment is reversed, and judgment is entered here for plaintiff for $3,660.29, the amount of the verdict.

JUDGMENT REVERSED AND JUDGMENT HERE FOR PLAINTIFF FOR $3,660.29.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

for the plaintiff, and we can find nothing for record which
justified the court in granting a new trial. Therefore, the
judgment is reversed, and judgment is entered here for plaintiff
for $2,050.00, the amount of the verdict.

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L. L. MOSHER, JR., et al.,
(Plaintiff) Appellant,
v.
CHICAGO TITLE AND TRUST CO., a corporation, and GEORGE A. LEE,
(Defendants) Appellees.

APPEAL FROM
SUPERIOR COURT
OF COOK COUNTY.

294 I.A. 609

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On October 13, 1931, George Young, a stockholder in the Marigold Building Corporation, filed a bill in chancery against this corporation, George A. Lee, George Young, Peter A. Mortenson, Phillip Edelberg and William D. Johnson, its directors, its executive officers, Baird and Warner, Inc., the State Life Insurance Company of Indiana, and the Chicago Title & Trust Company, in which he charged generally that the corporation had procured a loan of $250,000 from the State Life Insurance Company of Indiana; that out of the proceeds of the loan, the sum of $125,000 was paid to the corporation; that the remainder of the loan had not been accounted for in the books and records of the corporation; that $10,000 of the amount borrowed was set aside to remodel and repair the property, and was for this purpose deposited with Baird and Warner, Inc.; that no account of this money had been made, and that the corporation had no record of the receipts and disbursements out of this fund; that repeated requests had been made for an accounting from George A. Lee and the other directors, and that no such accounting had been forthcoming; that the business of the corporation was run by Lee, who held himself out as agent thereof without authority; that the plaintiff is the holder of a number of shares of stock in the corporation; that Lee and his group had taken possession of the books of the corporation and had collected

L. L. MORRIS, JR., et al.,

(Plaintiff) Appellant,

v.

Corporation, and GEORGE T. ELY,

(Defendants) Appellees.

On October 19, 1961, George Young, a stockholder in the Merrick Building Corporation, filed a writ in summary ejectment in this corporation, George T. Ely, George Young, Peter A. Lawrence, Phillip Bickford and William B. Johnson, its directors, its executive officers, Bell and Gurney, Inc., the Bryce Life Insurance Company of Indiana, and the Citizens Title & Trust Company, to which be charged generally that the aforementioned had produced a loss of $150,000 from the State Life Insurance Company of Indiana; that out of the proceeds of the loan, the sum of $125,000 was used to the corporation; that the remainder of the loan was not used for the purpose, and the $10,000 of the amount borrowed was not title to property had accounted for in the books and records of the corporation; that the property, and the $10,000 was not used for the purpose of the corporation and the investment and disappearance of this sum; that no account of this money had been made, and that no much accounting had been forthcoming; that the business of the corporation was run by Ely, who held himself out to young investor, and the other directors, and that economic loss to the corporation; that no part of this sum; that unknown persons had been made for an without authority; that the plaintiff is the holder of a number of shares of stock in the corporation; that Ely and his wife hold

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L. L. MORRIS, JR., et al.,

(Plaintiff) Appellant,

v.

GEORGE T. ELY, et al.,

(Defendants) Appellees.

ON MOTION TO DISMISS APPEAL

a large amount of money out of accounts due to the corporation, had refused to permit plaintiff to inspect the books of account, had refused to render an account, and had failed and refused to apply the money borrowed in payment of the debts of the corporation; that upon an accounting, it would be found that a large balance was due the corporation from the stockholders and operating directors, and that Lee and certain of the stockholders had used the funds of the corporation for their own account, and were causing the corporation to become insolvent. He further sought to enjoin the persons mentioned from collecting the corporation's accounts, and from using the funds for themselves, and asked for a receiver.

Subsequently, on September 26, 1932, William H. Johnson and others, alleged stockholders in the building corporation, filed an intervening petition in which they sought an accounting from the persons mentioned in the original bill. Thereafter, on June 10, 1933, the intervenors filed a cross bill in the proceeding, in which they prayed for an accounting and a discovery from the State Life Insurance Company of Indiana. While the original bill, intervening petition and cross bill were pending, the Marigold Building Corporation was adjudged a bankrupt by the United States Court, its assets were sold, and on July 13, 1936, L. L. Mosher, Jr., appellant, purchased from the trustee in bankruptcy all the claims of the Marigold Building Corporation against the State Life Insurance Company of Indiana for the sum of $800.00, and on July 21, 1936, Peter A. Mortenson and W. H. Johnson purchased from the trustee in bankruptcy, the claims of the Marigold Building Corporation against George A. Lee and the Chicago Title & Trust Company for the sum of $2,300.00.

On August 28, 1936, L. L. Mosher, Jr., Peter A. Mortenson and W. H. Johnson filed a petition in this cause and after a hearing

thereon, the court found and decreed, as alleged and proved, that the petitioners were purchasers from the trustee in bankruptcy of the claims above referred to, and that they had succeeded and became possessed of all right, title and interest of the bankrupt in and to the real estate involved, and of all property and assets of the bankrupt, and in particular, that they had succeeded and had become and were the sole owners of all rights, claims and causes of action which any creditor or creditors of the bankrupt might have asserted against the State Life Insurance Company of Indiana, the Chicago Title & Trust Company and George A. Lee, including all such rights, claims and causes of action asserted, or intended to be asserted in and by the bill of complaint, intervening petitions, cross bills of complaint, answers and other pleadings theretofore filed in the cause, and have become invested with the right to prosecute all such claims and demands, as well as to present all defenses to the note and mortgage given to the State Life Insurance Company of Indiana, in their own name and right to the exclusion of all other parties, including certain parties mentioned in the original bill of complaint filed. It was further decreed that L. L. Mosher, Jr., Peter A. Mortenson and W. H. Johnson be substituted for all the parties who had asserted any claims, including those claims listed or referred to in the bill of complaint, and including the claim of George Young, the complainant in the original bill filed, the trustee in bankruptcy, the Marigold Building Corporation and certain intervenors, all stockholders in the building corporation as a class, and all creditors of the building corporation as a class. The court further decreed that all the parties whom Mosher, Mortenson and Johnson had succeeded in right and interest, each and all be dismissed as parties to the cause in lieu of Mosher, Mortenson and Johnson, who were thereby substituted for such parties. It is to be noted here that this decree was entered at the behest of Mosher

and was not appealed from.

On September 11, 1936, upon the petition of Mosher, Johnson and Mortenson, the court entered a finding and order to the effect that all pleadings, except the cross bill of the State Life Insurance Company of Indiana, theretofore filed, and the "pleadings filed by the Chicago Title & Trust Company and George A. Lee, be superseded and disregarded as pleadings filed in the cause", and that L. L. Mosher, Jr., William H. Johnson and Peter A. Mortenson have leave to file instanter an amended and supplemental bill of complaint in lieu of such superseded pleadings, and that the State Life Insurance Company of Indiana, George A. Lee and Chicago Title & Trust Company file answers to the amended and supplemental bill of complaint. On this same date, Mosher, Johnson and Mortenson filed their amended and supplemental bill in which they again assert their individual rights against the Chicago Title & Trust Company, George A. Lee and the State Life Insurance Company of Indiana, as they were purchased from the trustee in bankruptcy. Thereafter, George A. Lee and the Chicago Title & Trust Company filed their individual and separate answers setting forth their defenses to these claims. Pending the litigation, the State Life Insurance Company of Indiana had filed a cross bill to foreclose a mortgage on the real estate involved, and on December 17, 1936, a decree of foreclosure was entered on the cross bill in favor of the State Life Insurance Company of Indiana, containing the following recital: "Reserving the rights of L. L. Mosher, Jr., Peter A. Mortenson and William H. Johnson to proceed upon their amended and supplemental bill of complaint against Chicago Title & Trust Company and George A. Lee, the said decree being without prejudice to the said rights and without prejudice to the order of reference and to all proceedings and all evidence heard pursuant thereto." It is to be noted here that in this decree, it is again found that Mosher, Mortenson and

and was not appealed from.

On September 21, 1938, upon the petition of Hudson,
Johnson and Mortenson, the court appointed a visiting and duties to the
effect that all pleadings, except the cross bill of the Grand Life
Insurance Company of Indiana, Intervenors filed, and the injunction
filed by the Chicago Title & Trust Company and George A. Lee, be
superseded and disregarded as pleadings filed in the cause", and
that I. I. Hosier, Jr., William G. Johnson and Peter L. Mortenson
have leave to file instanter an amended and supplemental bill of
complaint in lieu of such superseded pleadings, and that the Grand
Life Insurance Company of Indiana, George A. Lee and Chicago Title
& Trust Company file answers to the amended and supplemental bill
of complaint. On this same date, Johnson and Mortenson
filed their amended and supplemental bill in which they again assert
their individual rights against the Chicago Title & Trust Company,
George A. Lee and the Grand Life Insurance Company of Indiana, as
they were purchasers from the trustee in bankruptcy. Thereafter,
George A. Lee and the Chicago Title & Trust Company filed their
individual and separate answers setting forth their defenses to
these claims. Pending the litigation, the Grand Life Insurance
Company of Indiana had filed a cross bill to foreclose a mortgage on
the real estate involved, and on December 17, 1938, a decree of fore-
closure was entered on the cross bill in favor of the Grand Life
Insurance Company of Indiana, containing the following recital:
"Reserving the rights of I. I. Hosier, Jr., Peter L. Mortenson and
William G. Johnson to proceed upon their pending and supplementary
bill of complaint against Chicago Title & Trust Company and George
A. Lee," the said decree being without prejudice to the said matters
and without prejudice to the right of Mortenson and to all claiming
and all matters heard thereunder thereto." It is to be noted that
that in this decree, it is again found that Mortenson

Johnson held title to these alleged claims "in their own name and right to the exclusion of all other parties". This decree also dismissed for want of equity, the claim of Mosher against the State Life Insurance Company of Indiana. We note here that, so far as the record indicates, the only interest Mosher had in any claim was that against the insurance company, which was obtained through the sale to him of the claim against the insurance company, made by the trustee in bankruptcy, and that no appeal was taken from this decree.

After the entry of the foreclosure decree, on December 17, 1936, Peter A. Mortenson died on January 5, 1937, and on February 15, 1937, Raymond E. Carlson filed a petition in which he set forth the purchase by him of the claims of Mortenson and Johnson against the Chicago Title & Trust Company and George A. Lee, and that he, Carlson, was at that time the sole owner of the claim. Subsequently, on April 20, 1937, Mosher again appeared in court and stated, in effect, that he did not mean it when he formerly represented to the court and induced the court to find, that he was the sole owner of the claim against the State Life Insurance Company of Indiana, and presented a petition for leave to intervene, in which it is stated that during all the time the litigation was pending, and when he had filed the various claims and petitions hereinbefore referred to, he had represented other named parties, and asked leave of the court to file a petition on their behalf. Leave to file this petition was denied, and no appeal was taken therefrom. On May 20, 1937, Mosher again appeared, together with these certain other persons, and again asked leave to file a supplemental petition in which the same claim is made as that just hereinbefore referred to, to-wit: that in all the prior proceedings Mosher had acted, not for himself, but in a representative capacity. The court held that the claim of Mosher had been adjudicated, and entered an order denying this

petition. It is from this order that the appeal here is being prosecuted. Any claims of Johnson and Mortenson against the Chicago Title & Trust Company and Lee have already been disposed of, and are not involved. We are of the opinion that the court was right when it denied the petition. The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

petition. It is from this order that counsel here is being prosecuted. Any ruling of Lordships will therefore regulate the course Title & Trust Company and has been already been discussed, and are now involved. On one of the matters that the court has right when it denied the petition. The Lawyer of the Superior Court of Cook County is without.

CONCLUSION.

MCGEE, T.J. AND DAVIS E. COLLINS, J. DISSENT.

39336

GEORGE R. FISHER, for use of Adelbert Kiniry,

Appellant,

v.

ASSOCIATED UNDERWRITERS, INC., an Illinois corporation, as attorney-in-fact for an aggregation of individuals commonly known and doing business as Chicago Lloyds,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

294 I.A. 609

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with case No. 39330, entitled, George R. Fisher, for use of Lucille Kiniry, Appellant, v. Associated Underwriters, Inc., etc., Appellee, in which case we have this day filed an opinion. Both procedures were instituted to recover damages for injuries sustained in the same automobile accident. The Superior Court entered judgment for Lucille Kiniry in case No. 39330 for $10,000.00 and in this case a judgment for $15,000.00 for Adelbert Kiniry.

Since the facts and circumstances in both cases are practically identical, the law applicable in case No. 39330 is controlling in this case.

For the reasons set forth in our opinion in case No. 39330, the judgment of the Superior Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND HALL, J. CONCUR.

2934 1.A. 609

39646

BENJ. HARRIS & CO., a corporation,

(Plaintiff) Appellee,

v.

WESTERN SMELTING AND REFINING CO., a corporation,

(Defendant) Appellee,

MITCHELL-JACKSON, INC., a corporation,

(Garnishee) Appellee.

On Appeal of BEKINS VAN & STORAGE CO., also described as BEKINS VAN & STORAGE COMPANY,

(Intervening Petitioner) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

294 I.A. 610

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff Benj. Harris & Co., a corporation, brought an attachment suit in the Municipal Court against Western Smelting and Refining Co., a corporation, defendant, for damages sustained because of a breach of contract. The cause was heard before the court without a jury, resulting in a judgment for $3,750 and costs in favor of plaintiff and against the defendant. The intervening petitioner Bekins Van & Storage Co. brings this appeal.

The facts before us for consideration are as follows:

The ground for attachment as alleged in the verified statement of claim is the nonresidence of the defendant Western Smelting and Refining Co.

Summons was served on Mitchell-Jackson, Inc., as garnishee, and said corporation is one of the appellees herein. Service was had on the Western Smelting and Refining Co. by publication.

In its affidavit of claim the plaintiff Benj. Harris & Co., a corporation, stated that the Western Smelting and Refining Co. offered in writing to sell to the said plaintiff one car load

2094 A. 610

of mixed brass at 6 1/2 cents per pound f.o.b. Chicago Heights, Illinois, terms 90%; that plaintiff accepted said offer and has been ready and willing to accept said mixed brass and is ready, willing and able to pay the purchase price thereof upon receipt of said brass; that defendant has refused to deliver and has failed to abide by said written contract; that the market price of said mixed brass has increased since plaintiff entered into said contract with defendant and that plaintiff is damaged to the extent of $1,500.

The answer of the garnishee states that a car load of copper was placed in the warehouse of the garnishee and that a warehouse receipt was issued to Bekins Van & Storage Co., intervening petitioner and appellant herein.

One of the parties describes the subject-matter of this controversy as "copper" while the others describe it as "brass". We have adopted the latter name in this opinion.

Bekins Van & Storage Co. filed its petition alleging that it was the owner of the car load of brass which was in the possession of the garnishee.

In the first statement of claim the plaintiff alleged damages to the extent of $1,500 and thereafter on motion of said plaintiff the ad dammum was increased on the trial from $1,500 to $4,000 and its bond was increased to $8,000.

In order to keep the various parties to this transaction in mind, we recapitulate that the plaintiff Benj. Harris & Co. is an Illinois corporation with an office in Chicago; that the defendant Western Smelting and Refining Co. is a foreign corporation located in Omaha, Nebraska; that the garnishee Mitchell-Jackson, Inc. is a corporation organized under the laws of the State of Illinois and is located in Chicago, and that the intervening petitioner Bekins Van & Storage Co. is located in Omaha, Nebraska.

In its answer the garnishee states that a car load of

brass was placed in the warehouse of the garnishee and that the warehouse receipt which was impounded at the trial was issued to Bekins Van & Storage Co. The intervening petitioner, appellant here, alleges that it was the owner of the car load of brass which was in the possession of the garnishee.

The cause was tried before the court without a jury. At the conclusion of all the evidence and the argument of counsel, the court found that the car load of brass in the possession of the garnishee Mitchell-Jackson, Inc., was the property of the defendant Western Smelting and Refining Co. The court entered an order that the warehouse receipt for said carload be impounded with the clerk of the court. The intervening petition of Bekins Van & Storage Co. was denied. A judgment was entered in favor of plaintiff for $3,750 and costs and against the defendant Western Smelting and Refining Co., a corporation. Judgment was also entered against the car load of brass in the possession of the garnishee. The garnishee was ordered to deliver said car load of brass to the bailiff of the Municipal Court of Chicago, on special execution to issue against the garnishee, and that out of the proceeds of sale by the bailiff the sum of $465.60 be paid to the garnishee Mitchell-Jackson, Inc., and the sum of $3,750, the amount of the original judgment xxxxxxxxx and costs and interest on said judgment, be paid to Sidney J. Wolf as attorney for plaintiff, and the balance, if any, paid to the defendant Western Smelting and Refining Co.

Neither plaintiff nor defendant have appealed from the judgment entered in the lower court and this appeal is brought solely by the intervening petitioner.

Evidence was heard on both sides which evidence in most instances was conflicting. The substance of the evidence is that on November 21, 1936, the defendant Western Smelting and Refining Co.

sent a letter to the plaintiff that they were contemplating selling 100,000 pounds of railroad brass which they had located at the Mitchell-Jackson, Inc. warehouse at Chicago and asked plaintiff to bid on that material; that after negotiations were had between plaintiff and defendant, the representative of the plaintiff corporation called at the defendants office on November 30, 1936 and entered into an agreement whereby defendant agreed to sell and plaintiff agreed to purchase one car load of brass located at the Mitchell-Mackson, Inc. warehouse in Chicago, at the price of 6 1/4 cents per pound, f. o. b. Chicago Heights, Illinois, terms 90%, whereupon defendant executed and delivered to plaintiff written confirmation of the sale; that on December 10, 1936, plaintiff received an invoice from the defendant covering 100,025 pounds of brass, at $6.25 per cwt. or a total cost of $6,251.56; that on December 7, 1936, the intervening petitioner, Bekins Van and Storage Co. sent a letter to plaintiff stating they were releasing warehouse receipt covering one car load of scrap brass stored at Mitchell-Jackson, Inc., and that they were drawing a draft on plaintiff for $5,625 on the Northern Trust of Chicago.

The evidence further shows that on December 8, 1936, plaintiff sent a letter to intervening petitioner acknowledging receipt of the letter dated December 7th and stating that their understanding was that the material was to be loaded and shipped, sight draft, for 90% of the value attached, to Chicago Heights and that plaintiff would be pleased to take care of the draft with the understanding that there were no incumbrances against the scrap and that all storage charges would be paid by intervening petitioner; that on December 12, 1936, intervening petitioner sent a telegram to plaintiff stating that storage charges would be paid by them direct to Mitchell-Jackson, Inc.; that on December 14, 1936, plaintiff received a telegram from

defendant requesting $500 on account of the brass sold to plaintiff and in reply plaintiff sent a letter to defendant stating that it would be necessary for them to know who was to receive all of the moneys covered by the transaction; that on December 14, 1936, plaintiff received a telegram from intervening petitioner stating that the draft had been reduced by the balance due Mitchell-Jackson, Inc., (garnishee herein).

The evidence further shows that plaintiff's place of business was located at Chicago Heights, Cook County, Illinois; that on December 15, 1936, plaintiff delivered certified check drawn on Continental Illinois National Bank and Trust Company of Chicago to the Northern Trust Company to pay the draft drawn upon it by intervening petitioner and the testimony shows that this check represented 90% of the purchase price of the brass, less the storage charges due Mitchell-Jackson, Inc. and was the correct amount of the draft after it had been reduced.

A witness from the Northern Trust Company, who was called as a witness on behalf of the intervening petitioner testified that plaintiff presented the certified check at 2:15 in the afternoon on December 15th, and that payments made after 2:00 P.M. are accepted.

The witness further testified that on December 15, 1936, at 8:30 A. M. they received a long distance telephone call from intervening petitioner requesting them not to accept payment on the draft and to return the draft to Omaha.

Plaintiff's theory of the case is that it is entitled to an attachment of the goods in question, by reason of the non-residence of the defendant, Western Smelting & Refining Co., and by reason of the purported contract of sale of the goods in question to plaintiff, by said defendant, a copy of which is attached to plaintiff's

statement and affidavit of claim; that it accepted the alleged sale; that Bekins Van & Storage Co. at the request of plaintiff, agreed to pay the storage charges but failed to do so; that the Bekins Van & Storage Co. sent a sight draft and warehouse receipt to Northern Trust Company, Chicago, for $5,625, which was later reduced to $5,264; that on December 15, 1936, the plaintiff tendered payment of this reduced draft but was informed by the bank that the draft had been returned to Bekins Van & Storage Co., the intervening petitioner herein.

The theory of the Bekins Van & Storage Co., intervening petitioner and appellant here, is "that it was and is the owner of the warehouse receipt issued to it on April 5, 1934, covering the goods in question; that it had never parted with its title thereto; that it never saw the alleged offer to plaintiff made by Western Smelting & Refining Co.; that the Western Smelting & Refining Co. desiring to purchase the goods in question as the agent and representative of Benj. Harris & Co. instructed the intervening petitioner to draw a draft against Benj. Harris & Co. on the Northern Trust Company of Chicago, for the price of $5,625, and to also forward said warehouse receipt to said bank with advice to deliver said warehouse receipt to Benj. Harris & Co. upon payment by it of said sight draft; that this intervening petitioner did as so requested, and by letter of December 7, 1936, so notified Benj. Harris & Co., but said sight draft was not paid and said unpaid draft together with said warehouse receipt was on December 15, 1936, returned to this intervening petitioner by said bank; that the sale alleged to have been made by Western Smelting & Refining Co. to ship car load of mixed bras f. o. b. Chicago Heights, Illinois, was not only not confirmed by the intervening petitioner, but refused by the plaintiff, who demanded that the warehouse charges be paid by said intervening petitioner direct to the warehouseman. This counter offer of

plaintiff was followed by counter instructions of intervening petitioner, but plaintiff failed and refused to carry them out and make payment accordingly. That by reason of the neglect and refusal of the plaintiff to pay said draft, as reduced in amount, as per counter instructions from intervening petitioner, there was no meeting of the minds of any of the parties at any time, and no contract of sale made or consummated, that the Western Smelting and Refining Co. never had title to the goods in question, and was not a selling agent of Bekins Van & Storage Co., intervening petitioner herein".

That statement of the case, as pointed out by plaintiff, is inaccurate.

Many of the errors relied on for reversal by appellant here, some 18 in number, were on account of rulings by the trial court, such as increasing the ad damnum, sustaining the attachment and permitting the plaintiff to file a new attachment bond. The defendant and the garnishee have not joined in this appeal, so apparently they have no complaint to make and the intervener cannot complain on their behalf.

The whole question is based on the dispute as to the ownership of the car load of brass. The cause was submitted to the trial court without a jury and the question to be decided was one of fact. The trial judge saw the witnesses and heard them testify and was in a better position to judge as to their credibility and the preponderance of the evidence than is a court of review.

This suit was entered for the amount of damages which was the difference between the purchase price of the car load of brass, namely, 6 1/4 cents a pound and the value of the brass during December, 1936, which was 10 cents a pound.

It is also claimed by intervening petitioner that the

pleadings were not at issue and no answer was filed to the intervening petition. No prayer was made by petitioner to have the court rule the parties to answer its petition and it cannot raise the question here for the first time.

At the time of the trial the intervening petitioner, appellant herein, did not at any time question the sufficiency of plaintiff's statement of claim.

Rule 213 of the Municipal Court relates to the statement of claim, garnishment and interrogatories. It is too lengthy to set forth in full here, but in our opinion this rule was fully complied with by plaintiff and the court decided within the purview of this rule.

It is contended by appellant that the amount of the judgment in the trial court was greater than the amount stated in the publication notice. The question cannot be raised for the first time in this court. The only person who could raise that question would be the defendant against whom the judgment was rendered and it does not question such judgment here.

Complaint was made at the trial that plaintiff had amended the statement of claim on its face by increasing the amount of its damages to $4,000. Neither the defendant nor the garnishee has appealed and, therefore, the appellant has no right to question the amount of the judgment entered against the defendant.

From a review of this case, which is rather involved, we are of the opinion that the evidence sustains the position of the plaintiff. There was a fair trial in which all the parties were permitted to present their contentions and we cannot say that the trial court was wrong in deciding as it did. The evidence sustains the position taken by the plaintiff and we are of the opinion that

the trial judge did right in finding the issues for the plaintiff.

For the reasons herein set forth the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

39665

GEORGE N. CASE,

Appellee,

v.

GREEN OIL SOAP COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

B 9 A

294 I.A. 610

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

George N. Case brought suit against the Green Oil Soap Company to recover the sum of $858.95 due him as wages, and a further sum of $75.00 as attorney's fees, in accordance with the statute, making a total of $933.95. The item of $858.95 represented a balance due plaintiff over a period of years prior to September 29, 1934, as defendant had been falling behind in its payment of salary to plaintiff and carried a balance in arrears as an open account for wages.

Plaintiff's statement of claim refers to the agreement of July 29, 1936, between plaintiff and defendant, being Exhibit A, which reads as follows:

"GREEN OIL SOAP COMPANY
166 N. CURTIS STREET
CHICAGO
PHONE HAYMARKET 5682

July 29, 1936.

By mutual agreement between the Green Oil Soap Company and George N. Case: It is agreed that the account of salary credits as appear upon the Ledger Book of the Green Oil Soap Company, showing a balance of $918.95 as of September 29, 1934, is hereby settled for an agreed sum of $400.00, said amount to be paid to Geo. N. Case in installments of $20.00 twice each month, beginning with first payment on the 10th of August, 1936, until the full amount of $400.00 is paid.

Signed by both parties this 29th day of July, 1936.

GREEN OIL SOAP COMPANY
BY W. M. KELSO
President
GEO. N. CASE.

Postscript: In case the full amount of $400.00 is not paid in full then the above agreement is void.

W.M.K.
G.N.C."

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The statement of claim further alleges that subsequently defendant paid $60 under this agreement, leaving a balance of $858.95, the amount sued upon for wages; that plaintiff made repeated demands and on December 23, 1936, caused a demand to be served upon said defendant by registered mail for the payment of said wages in accordance with the statute in such case made and provided, which demand was ignored by defendant.

Defendant in its affidavit of merits stated that plaintiff was employed by defendant for more than 4 1/2 years, up until July 29, 1936, as its chemical engineer and was in possession of its secret formulas for the manufacture of soap; that plaintiff has received more than all salary belonging to him by virute of said employment; that the alleged agreement is not an account stated, as it appears on its face to include only the salary credits of plaintiff and does not therefore preclude defendant from filing its counterclaim; that the alleged agreement was entered into while the defendant was in ignorance of the essential facts; that plaintiff had by mistake of defendant's bookkeeper been given a salary credit of $918.95 not belonging to him, and that the plaintiff had been paid $184.10 for time during which he worked for a competitor of the defendant, all of which was not discovered by or known to the defendant until the alleged payments had been made thereunder.

In its counterclaim defendant states that plaintiff is indebted to defendant for $180.00, as borrowed money upon an I.O.U which is in words and figures, as follows: "March 20, 1931 To Green Oil Soap Co. I-O-U Cash advanced $180.00 One Hundred & Eighty Dollars. Signed Geo N Case."

The counterclaim further alleges that plaintiff owes defendant $191.05 for borrowed money on open account as follows:

May 31, 1934, $100.00, June 9, 1934, $50.00, June 15, 1934, $41.05; that plaintiff owes defendant the sum of $184.10 which was paid by defendant to plaintiff for 44 half days service at the rate of his then salary of $45 for a five and a half day week, during which time plaintiff was in the actual service of a competitor of defendant, which fact was not discovered by or known to the defendant until the alleged payments under the alleged agreement had been made; that plaintiff owes the defendant the sum of $15.00 for money advanced for automobile tires at plaintiff's special instance and oral request on April 30, 1933; that plaintiff owes defendant $200 for damages for soap of defendant spoiled as a consequence of plaintiff's gross negligence in the manufacture of soaps for defendant, while in its employ, resulting in the loss of soap material, labor, and other losses incidental to the manufacture, merchandising, shipping and return of spoiled soap; that plaintiff, although often requested has not paid said amounts nor any part thereof to the defendant, to the total damage of defendant in the sum of $770.15. This counterclaim is verified by Wilber M. Kelso, president of the defendamt corporation.

Notice of motion by plaintiff for a summary judgment was filed May 6, 1937, and with that an affidavit by the bookkeeper who kept the books of account of the defendant. That affidavit reads as follows:

> "Astrid Lindstrom, being first duly sworn on oath deposes and says that she was employed as a bookkeeper by the defendant corporation herein during a period from 1930 to 1936; that she has knowledge of the facts herein; and that she makes this affidavit in connection with the motion of the plaintiff for a summary judgment against the defendant, under the provisions of Rule No. 111 of this Court.
>
> Affiant further avers that she knows of her own knowledge that the plaintiff, George N. Case, was employed by the defendant for a period of approximately 12 years up to and including the latter part of July, 1936; that for some period of time previous to September 29, 1934, defendant fell in arrears on its payment of salary to plaintiff, and that said arrears were carried on the

books of defendant as an open account; that on September 29, 1934, there was a balance due to plaintiff for said wages on the books of defendant in the sum of $918.95; that subsequently on July 29, 1936, the plaintiff and defendant entered into the written agreement contained in plaintiff's Statement of Claim and marked Exhibit "A".

Affiant further avers that she knows of her own knowledge that plaintiff gave all of his time as an employee to said defendant, and that he did not work for anyone else during his said period of employment by defendant; that affiant although she was in the office of defendant, at all times, never heard of any claim by defendant against the plaintiff for alleged damages due to the plaintiff's negligence as an employee as described in defendant's Counterclaim herein; that all the matters contained in defendant's Counterclaim with reference to I.O.U's for moneys alleged to have been borrowed by the plaintiff from the defendant were all salary transactions and were all dated previous to and merged in the agreement between the parties.

Affiant further avers that she knows of her own personal knowledge that the plaintiff is entitled to the sum of $918.95 as salaries due to him from the defendant, less any payments which may have been made by the defendant on said agreement, in accordance with the books of the defendant company.

Further affiant sayeth not.

Astrid Lindstrom.

Subscribed and sworn to before me this 5th day of May, 1937.

Morris A. Krasnow,
Notary Public."

Accompanying the above affidavit is an affidavit of plaintiff attacking the good faith of the amended statement of defense filed by defendant herein; that all the matters contained in defendant's counterclaim are salary transactions which antedate the settlement they had on July 29, 1936, and are merged in the account stated between the parties.

On May 6, 1937, the court continued the motion for a summary judgment and on May 10, 1937, entered the judgment in favor of the plaintiff and against the defendant.

It appears to us that this case was a settled account and the attempt of the defendant to reopen it, as a matter of defense and to bring in occurrences and set-offs which dated back several years prior to the suit, would not be justified as the law will not permit the deliberate settlement of an account to be reopened except

for the clearest evidence of fraud or mistake in the settlement.

The claim set forth in the affidavit of defense that the bookkeeper made a mistake is a mere conclusion and is overcome by the affidavit of the bookkeeper who kept the defendant's books, in which affidavit it is alleged that no such error had been made.

We do not think that the defense offered by the defendant created an issue worthy of trial and the defendant's counterclaim was apparently an afterthought. We do not believe the trial court erred in entering the judgment.

As to the attorney's fees of $75, no question has been raised in this court as to whether they apply in the case of an employee of this kind and, for that reason, we are not passing on the same.

From the facts and evidence before us we are of the opinion that the money was due and owing by this company to its employee and he was entitled to receive the same. Defendant's failure to pay it in accordance with the agreement fully justifies the judgment entered against it in the trial court.

Finding no error in the record the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

39677

MARY NORTON,

Appellant,

v.

BUY A. RICHARDSON and WALTER J. CUMMINGS, as Receivers of Chicago Railways Company, a corporation and HARVEY B. FLEMING and EDWARD E. BROWN, as Receivers of Chicago City Railway Company, Calumet and South Chicago Railway Company, and the Southern Street Railway Company, corporations; doing business as Chicago Surface Lines,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

294 I.A. 610

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff Mary Norton brings this appeal from a judgment for costs entered against her in the Circuit Court on a directed verdict in a personal injuries suit brought by her against the above named defendants. A motion was made to instruct the jury for the defendants at the close of plaintiff's case, but the same was reserved and upon a renewal of said motion at the close of all the evidence the same was granted.

The complaint charges that plaintiff was a passenger for hire on one of the street cars owned and operated by defendants, and whilst proceeding with due care to obtain a seat, the defendants so negligently managed said car that a sudden violent motion of said street car threw the plaintiff to the floor, whereby she sustained bodily injuries which incapacitated and prevented her from performing the duties of her profession as a public school teacher for which plaintiff asks $10,000.00 damages.

Defendants answer denies that plaintiff fell in the street car, but that if she did fall, defendant denies that she fell in consequence of the street car having been negligently managed; alleges on information and belief that on the occasion in question some girls suddenly and unexpectedly ran in front of the street car while it was in motion and that to avoid striking them it was necessary to

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stop the street car suddenly and that by said stopping, the striking of said girls was avoided and that whatever motion was made by said street car in stopping was necessarily incident to making said stop in time to prevent the street car striking the girls and that said stop was carefully made under the circumstances; alleges on information and belief that plaintiff did not sustain injuries, and that if she did they were not caused by defendants' negligence.

Plaintiff testified that at the time of the accident on March 29, 1933, she was 65 years of age and weighed about 150 pounds; that she had been a public school teacher for over 38 years and was teaching sixth grade in March, 1933; that on the day of the accident about 9 P.M. she was returning to her home at the Gladstone Hotel located at 62nd and Kenwood avenue, Chicago; that she took a Cottage Grove avenue street car and when she arrived at 63rd street she got off and boarded an eastbound 63rd street car and paid her fare; that both street cars were operated by defendants; that as she was going into the car there was a sudden swing back of the door leading from the back platform into the car; that she did not fall but went into the car which was well-lighted and she was walking toward one of the seats when a very sudden and extremely violent jolt of the car threw her forward on to the car floor; that a couple of men helped her up; that she was sort of dazed and shattered by the fall and "seemed to hurt all over", that her left arm and left knee hurt particularly and her right arm also hurt; that as a result of the injuries which she received she was prevented from doing any further work and lost her position as a consequence thereof; that she had been paid in excess of $2,000 a year as a teacher.

Timothy Ash, called as a witness on behalf of defendants, testified that he was the conductor on the street car on which the plaintiff was injured on March 29, 1933; that plaintiff boarded the street car and that he was on the rear platform; that the car started

and went 12 or 13 feet and then came to a sudden stop; that he looked into the car and saw that plaintiff had fallen at about the third cross seat; that he helped her to her feet and assisted her to a seat; that apparently she was not badly injured.

Daniel O'Connor, called as a witness on behalf of defendants, stated that he was the motorman on the street car on March 29, 1933, when plaintiff "had some difficulty"; that the car was in good operating condition; that he stopped at the west side of Cottage Grove avenue; that seven or eight people alighted from the front platform among which were two girls who were the last to alight and after that he received the signal to go ahead; that the two girls started to walk east between him and the crosswalk - east on 63rd street; that he proceeded east in the same direction in which the girls were proceeding; that he proceeded about 10 or 12 feet and the two girls were still going east; that the car was about four or five feet from these girls at the time he stopped; that about 5 or 10 seconds elapsed from the time the girls got off the street car until he started the car; that at the time he started the car these girls were walking about 4 feet from his car between him and the curb, facing east; that he rang the gong but once and that at the instant he started the car the girls were "walking by the [illegible] car, front of the car going east"; that they walked in the direction in which the car was facing; that the street car traveled from 12 to 14 feet and then stopped; that both girls passed in front of the car together and that they had completely passed the car and north of it when he made the sudden stop; that the street car was the type that weighs between 40 and 50 tons and was equipped with air brakes; that it made a sharp stop, a sudden stop and gave the car quite a jerk that he put on full brake power; that at the time he had gone 12 feet he was going about 2 miles an hour; that "I

had the girls under my vision from the time they stepped off the car until they crossed; that I just missed the last one."

Other witnesses testified, including medical witnesses, but from the view we take of this case we do not deem it necessary to set forth their testimony here.

We do not think from the facts disclosed in this case that we need indulge in a lengthy discussion as to the rules of procedure when a motion is made at the conclusion of all the evidence, as was done in the instant case.

In the case of N.Y.C. & St. L. R. R. Co. v. Blumenthal, 160 Ill. 40, at page 48, the court said:

> "The happening of an accident to a passenger during the course of his transportation raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier. Undoubtedly the law requires the plaintiff to show that the defendant has been negligent. But, where the plaintiff is a passenger, a prima facie case of negligence is made out by showing the happening of the accident. If the injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, a presumption of negligence on its part is raised. (Gleeson v. Virginia Midland Railroad Co., 140 U. S. 435; Miller v. Ocean Steamship Co. 118 N. Y. 199; Galena and Chicago Union Railroad Co. v. Yarwood, 15 Ill. 468; and 17 id. 509; Chicago City Railway Co. v. Engel, 35 Ill. App. 490; Pittsburg, Cincinnati and St. Louis Railway Co. v. Thompson, 56 Ill. 141; Eagle Packet Co. v. Defries, 94 id. 598; North Chicago Street Railway Co. v. Cotton, 140 id. 486.) Proof that plaintiff was a passenger, that the accident happened, and that the injury was inflicted, imposes upon the carrier the duty to explain or account for the accident, and to prove that it resulted from a cause for which the carrier should not be held responsible. (Railway Co. v. Engel, supra; Railway Co. v. Thompson, supra). The circumstances of exculpation are its matter of defense. (Gleeson v. Railroad Co. supra.)
>
> Here, an injury was proven to have happened to a passenger while descending from a train of appellant's cars in the manner and under the circumstances already stated. We think that a prima facie case of negligence was made out, sufficient to throw upon appellant the burden of proving that the injury was not its fault. Whether or not the defendant offered such explanation of the accident as to relieve itself from the charge of negligence, and whether or not the plaintiff exercised due care for his own safety, were questions of fact for the jury, * * **

Other Illinois cases on the question of liability arising out of the sudden jerking or stopping of street cars and holding that

a sudden stop is evidence of negligence are: Kaldunski v. Chicago City Railway Co., 250 Ill. App. 475; Chicago City Railway Co. v. Morse, 98 Ill. App. 662, affirmed in 197 Ill. 327; Jones v. Chicago City Railway Co., 147 Ill. App. 640.

Whether or not the action of defendants in the operation and movement of said street car was free from negligence, was a question of fact. The motorman testified that he saw the girls who got off the street car and they were walking east in the same direction his car was going. Whether or not he should have driven his car so close to them that it was necessary for him to make a sudden stop and whether or not he should have anticipated that they might cross in front of his car were questions for the consideration of the jury.

The trial court should not in substance have said by its directed verdict that the defendants were not guilty of negligence. This was a question which should have been submitted to the jury to pass upon and it was error not to permit them to do so.

Because of the error committed and for the reasons herein given, the judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND HALL, J. CONCUR.

39741

CHARLES F. SPINDLER,

Appellee,

v.

ROBERT G. McKAY, WILLIAM J. LANG and JAMES C. FULLER,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

294 I.A. 610

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal is brought by defendants from an order refusing to grant the prayer of the petition and requesting that a judgment theretofore entered for the sum of $2,867.54 be vacated and that the defendants be allowed a hearing on the said claim of plaintiff and their defenses thereto.

From a rather incomplete abstract we gather that a business transaction between the plaintiff and the three defendants resulted in the defendants giving a note on November 6, 1931, for $2,500.00, for the purchase of stock in the American Amulco Asphalt Co., Inc., and was payable to plaintiff six months thereafter.

The evidence shows that on September 10, 1936, $300 was paid on said note and on November 6, 1936, another $300 was paid. It is difficult to determine from the petition just what it was that defendants relied upon at the time they gave the note. Some of the allegations in the petition are alleged to be facts and other allegations merely recite promises to do something in the future. Although some of the parties, appellants, are officers of the company, they allege that they had no knowledge of the corporation except as given to them by Spindler.

Defendants allege that prior to the time the note was given in November, 1931, that they had been acquainted with Spindler as both plaintiff and the defendants had been engaged in the selling of asphalt for different companies and that defendants had great confidenc

in the ability and honesty of Spindler, and because of that they relied upon and believed the representations made by him; that said Spindler further represented to said defendants that if they would unite with him and purchase the stock then held by said Johnson, and 999 shares of stock held by him, that he would assume full charge and management of the company, and could and would without their giving any time or attention to the affairs of the said company, operate it successfully and make money for them.

Defendants in their petition allege they tendered the certificates of stock for 1166 shares each and demand the return of the said note signed by them. The petition does not furnish sufficient information to advise the court whether, if a hearing is now had, a different result and finding by the court would be reached.

In the case of Chicago Fire Proofing Co, et al. v. Park National Bank, 145 Ill. 481, on commenting on petitions to vacate judgments, the court at page 487, said:

> "In an application of this character, to vacate a judgment and for leave to plead, affidavits filed in support of the motion are to be construed most strongly against the party making the application. It is not sufficient to state facts which, if proved on a trial, a defense might be inferred. Grossman v. Wohlleben, 90 Ill. 537."

In Mosbarger v. Brown, 313 Ill. 238, at page 248, the court said:

> "Fraud will not be presumed, but must be proved by such clear and convincing evidence that the mind is well satisfied that the charge is true. (Carter v. Carter, 283 Ill. 324.) Nor should fraud be based upon conjecture. (McKennan v. Mickelberry, 243 Ill. 117.)"

The petition does not show when they first learned of the alleged fraudulent representation of the plaintiff. The petition does show, however, that they confirmed their transactions with plaintiff by the giving of said note and the paying of $600 as payment on said note approximately five years after the making of the note. In addition to that they continued in business with

is the validity and necessity of Quimbler, and decision of that body relied upon and delayed the reinvestigations made by him; there would Defendant Luxtner recommends to make determinations that it does wants with him and purchase the stock then held by said Johnson, and 000 shares of stock held by him, when he would receive full control and management of the company, and would not would without fully giving any time or attention to the affairs of the said company, operate it successfully and ever money for them.

Defendants in their petition claim that because the conditions of stock for five shares gone and thereof the company of the said note signed by them. The petition does not contain sufficient information to advise the court whether, if a meeting is now held, a different result and finding by the court would be reached. In the case of Quimbo Lin Trading Co. et al. v. Penn National Bank, 142 Ill. App. 1, an unwillingness to participate to create jurisdiction, the court said at page 207, said:

"In an application at Bill Chancery, to revive a judgment and for leave be given, affidavits filed in support of the motion are to be answered need ordinarily contain the only matter upon the application. It is not sufficient to state there exists, if proved on a trial, a defense might be interposed. Thornton v. Northrop, 80 Ill. 132."

In Hendricks v. Brown, 111 Ill. App. 83, at page 87, the court said:

"Proof will not be received, but must be given by such client and convincing evidence to the mind is built a fully as the charge is true. (Gartner v. Gartner, 80 Ill. 134.) The should first be heard upon deposition." Thornton v. Stephenson, 80 Ill. 132.)"

The petition does not show that any first received of the alleged fraudulent concealment of the plaintiff. The petition does show, however, that duly qualified Bank attorneys with payment on said note subsequently time after the making of the note. In addition to that they testified in business with

Spindler and paid to one Johnson, a creditor of the company, two notes aggregating $5,000 and assisted the company with loans and credits. All these actions, of course, are inconsistent with the idea that they had been defrauded by appellee. Such affirmative acts of the parties have been held to constitute such waiver of the fraud tantamount to a ratification of the transactions. Brown v. Brown, 142 Ill. 409; Stackpole v. Schumucker, 225 Ill. 502; Gilbert v. Houck, 159 Ill. App. 347.

When judgment was entered by confession and after knowledge had been brought to the defendants, they waited until six months thereafter before making a motion to vacate said judgment and to permit them to file their defense. This was lack of diligence and no showing was made as to why they failed to take the necessary action within a reasonable time.

In Sternberger v. Wright, 239 Ill. App. 490, a motion to vacate a judgment by confession was made a month and five days after the judgment was entered. The court denied the motion because of defendant's lack of diligence.

In Kesner v. Truax, et al, 195 Ill. App. 285, a motion made almost three months after the judgment was rendered, was denied because it was made too late in the absence of a showing of diligence.

In Austin v. Lott, 28 Ill. 519, a motion to vacate a judgment by confession made four terms after the judgment was rendered was denied as coming too late. See also Freeman v. Counsell, 203 Ill. App. 333.

It is next claimed that the court erred in allowing attorney's fees under the power of attorney contained in the note. The confession clause provided for "_____dollars attorneys fees". The blank space before the word "dollars" was left untouched and no attempt was made to draw a line or other mark in the space. This

warrant of attorney did provide for attorney's fees, but no sum being specified it left the amount to be fixed by the court. We think that where the note provides for attorney's fees and no indication appears in the blank space, such as a line being drawn through to indicate that no attorney's fees should be paid, that the reasonable amount allowed by the court was not error.

As was said in Beard v. Baxter, 358 Ill. App. 340, at page 377:

> "It is conceded that where the space for the amount of attorney's fees is left blank and no definite sum is written therein that the note implies a promise to pay a reasonable attorney's fee."

Other points are raised, but we do not think they are controlling. From a review of the record we cannot find that any error was committed by the trial court sufficiently grave to warrant a reversal of the judgment.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

warrant a reversal of the judgment.

Court is silent.

JUDGMENT AFFIRMED.

Egbert, C.J., and Hill, J., concur.

page 777:

As was said in Ferrell v. Dupree, 106 Ala. 494, at
the reasonable amount allowed by the court for his attor-
ney's fee."

"It is proposed that since the appeal of
attorney's fees is left to the discretion of the trial
court, the rule applied to juries in determining the
amount of attorney's fees should be applied, that
is, that the court should not disturb the finding
of the trial court unless it is clear that the amount
allowed is excessive or unreasonable. In
determining whether the trial court's finding was
error was presented by the trial court's finding
constituting evidence in the chief court, such as a jury finding
thereof to indicate that no attorney's fees should be paid, that
the reasonable amount allowed by the court was error.

39346

ERNEST KAHN,
Appellee,

vs.

MILTON S. PLOTKE and
IRENE D. PLOTKE,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

42-A

294 I.A. 611

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

June 4, 1936, plaintiff, as owner of notes of the face value of $1600 secured by a mortgage on real estate, caused judgment by confession to be entered against defendants, makers of the notes. The judgment, including attorney's fees, was for $2079.80. June 16 defendants filed their motion to vacate the judgment, and an order was entered requiring the petition to be answered. An answer was filed, the cause heard before the court, the motion denied, and defendants appeal.

The record discloses that June 16, 1924, defendants were owners in fee simple of premises known as 4639-49 Lake Park avenue, Chicago, and on that day executed their 627 bonds for $235,000, payable to bearer, all of which bonds bore interest at 6½% and matured on or before June 16, 1932. They executed a trust deed on the property to secure the payment of the indebtedness. The proceeds of the bonds were used to construct a three-story and basement apartment building. The bonds provided they should pass by delivery, without endorsement, and further that defendant makers waived "protest and notice thereof, and notice of default or non-payment of principal hereof, interest hereon, or income taxes accrued, if any, and notice of any extension of time of payment of principal or interest." There was also a provision for confession of judgment.

June 17, 1932, the trustee under the authority of the trust deed filed a bill for foreclosure in which it was alleged

2944 1.7. 617

that bonds Nos. 1 to 84, both inclusive, aggregating $55,000, had been paid and cancelled, and alleged certain other payments on certain bonds. The bill contained the usual allegations and averred that on January 1, 1928, defendants Plotkes conveyed the premises by warranty deed to Joseph Rosenberg and Harry Zisook, subject to the indebtedness secured by the trust deed, which the grantees expressly assumed and agreed to pay; that the bill for foreclosure was brought by the trustee as a representative of all the bondholders. The Plotkes filed their answer in which they set up that the time of payment of the unpaid bonds in foreclosure was extended without their knowledge or consent and "worked a release of the liability of these defendants."

The case was referred to a master who made up his report, finding that on June 30, 1932, the trustee made demand for possession of the premises, which were surrendered to him, since which time he has been collecting the rents; and further, that there remained $245,933 due and owing on the bonds, and that it was "stipulated and agreed by and between the solicitors representing the complainant and the solicitor representing the defendants, Milton S. Plotke and Irene B. Plotke, his wife, that the extension as to the time of payment of Bonds Nos. 85 to 127 both inclusive *** was made without the knowledge, authority or consent of the defendants" Plotkes; that defendants, Rosenberg and Zisook had been personally served with summons and "are personally liable for the payment of the indebtedness." One of the conclusions of law of the master was that the "extension of the time of payment of the bonds hereinbefor set forth in this report worked as a release of the personal liabil of the defendants" Plotkes.

August 24, 1935, a decree of foreclosure was entered, a ph static copy of which is in the record and consists of 36 typewritt pages in which it is recited that it was stipulated and agreed be-

tween the solicitors representing the complainant (who was then Harold G. McKey, successor-trustee) and the solicitor representing the Plotkes, that the time of payment of bonds Nos. 85 to 127 had been extended without the knowledge or consent of the Plotkes. Immediately following this recital is paragraph 33 of the decree, which is typewritten and is as follows: "33. That the defendants, Joseph Rosenberg and Harry Zisook, have been personally served with summons in this cause," and that they were personally liable, but by drawing lines through it, the provision holding them personally liable was stricken out; and further, "that the extension of time of payment of certain principal bonds, as hereinbefore set forth, worked as a release of the personal liability of the defendants, Milton S. Plotke and Irene D. Plotke, on the indebtedness secured by the trust deed herein being foreclosed." Other provisions followed in the decree, and it was adjudged that the master sell the property and that the court retain jurisdiction for the purpose of entering a deficiency decree "against the defendants, Joseph Rosenberg and Harry Zisook, and, in case of such deficiency decree, the complainant, Harold G. McKey, as successor-trustee, shall be entitled to have execution issue as provided by law against the said defendants, Joseph Rosenberg and Harry Zisook," but the words providing for a deficiency decree against Rosenberg and Zisook and awarding an execution against them were stricken out by pen; and further, that plaintiff be entitled to the rents and profits in case of deficiency until the period of redemption expired.

Afterward the master sold the property for $35,000, a decree was entered approving the report of sale, in which a deficiency of $239,183.18 was entered, and it was ordered that McKey remain in possession for the purpose of collecting the rents to apply on the deficiency.

Defendants raised two defenses in the trial court: (1) that

3

the extension of the time of payment of certain bonds (other than the bonds sued upon in the instant case) operated to release them as makers of the bonds; and (2) that the findings of the foreclosure decree were res adjudicata of the issues involved in the instant case. In support of these contentions counsel for defendants says that the successor-trustee in the foreclosure suit represented all the bondholders and that they are bound by the foreclosure decree, from which no appeal has been taken; and that this is further shown by the fact that complainant in the foreclosure decree by taking a "deficiency decree against the rents and profits" discharged these defendants and released their obligation.

On the other side, counsel for plaintiff say that the stipulation in the decree (that the time of payment of certain of the bonds was made without the knowledge or consent of the Plotkes and released them from their personal liability on the bonds) is not res adjudicata in the suit at law by a bondholder against the defendants who were personally liable; that such finding in the decree is a nullity; that the instant case is not a collateral attack on the decree; that the decree is in rem and binds only the res and not the person.

We think defendants' contention cannot be sustained. It is apparent from the foreclosure proceeding that there was an agreement to release the Plotkes from personal liability. Obviously the extension of the time of payment of some of the bonds would not release them because the bonds expressly provided that the time of payment might be extended without notice to the Plotkes. There was no adjudication of the matter. The successor-trustee had no power to agree to release any such liability. One of his principal duties is to protect the interest of the bondholders.

That we are right in what we have just said further appears

by an examination of the decree. The decree, as prepared, expressly found Rosenberg and Zisook to have been personally served with summons and that they were personally liable for the indebtedness; and further, it was decreed that the court reserved jurisdiction for the purpose of entering the deficiency decree against Rosenberg and Zisook, and that plaintiff was entitled to an execution against them, but each of these provisions was stricken out of the decree as prepared, so that Rosenberg and Zisook, who expressly assumed and agreed to pay the debt, were relieved from personal liability. Of course, in any view of the facts or the law, there was no warrant for such action and it is a nullity.

Moreover, since plaintiff in the instant case had received no payment under the foreclosure decree, he may maintain his action on the bonds. He has more than one remedy and he may sue on the bonds, the only limitation being that he may not have more than one satisfaction. Okon v. Kasnas, 222 Ill. App. 45.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

39769

ROSE KRAMER et al.,
Appellees,

vs.

SAFEWAY LINES, INC., a Corporation, and ILLINOIS SAFEWAY LINES, INC., a Corporation,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

43 B A

294 I.A. 611

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for personal injuries claimed to have resulted through the negligence of the defendants in driving one of their buses in which plaintiff was a passenger, from New York City to Chicago, when the bus suddenly ran off the road, turned over and injured her. There was a verdict and judgment in plaintiff's favor for $15,000, and defendants appeal.

The record discloses that at about 8:45 o'clock on the morning of January 20, 1935, plaintiff boarded one of defendants' buses in New York City for Chicago. After they were out of New York about an hour the driver of the bus complained that it was not in proper condition. He stopped at Kearney, N. J., telephoned the New York office, advised them of the fact, and the Bus company sent another man who arrived in about an hour and took charge of the bus, the first driver having left or been discharged at Kearney, and the bus proceeded on its way to Chicago. About 7:30 o'clock in the evening, after dark, when a point somewhere near Lewistown, Pa., was reached, the bus, traveling at about 40 miles an hour on the righthand side of a three-lane driveway, suddenly ran across the pavement over the left shoulder and turned over, injuring a number of passengers, including plaintiff. Shortly thereafter plaintiff, together with the other injured passengers, was taken by the bus company to a hospital in Lewistown, where they

294 I.V. 611

were given surgical and medical attention. After about seven weeks plaintiff recovered sufficiently to return to her home in Chicago, where a doctor treated her for about three months.

The suit was brought against Indiana Safe Way Lines, Inc., and Safe Way Lines, Inc., Indiana corporations, and Illinois Safe Way Lines, Inc., an Illinois corporation, and it was charged that at the time in question the defendants, or some of them, were engaged in operating buses as common carriers from New York to Chicago.

The negligence charged against defendants, or some of them, was failure to equip the bus properly so as to carry plaintiff and other passengers with due safety, that the bus was not in a good state of repair, and that defendants, or some one of them, were negligent in permitting the bus to be operated by a tired, sleepy and incompetent driver. Defendant Safe Way Lines, Inc., an Indiana corporation, answered that it was originally incorporated as the Indiana Safe Way Lines, Inc., but that its name was changed on December 7, 1934. The answer further set up, "This defendant owns no automotive passenger buses whatever" and denied that it "permitted or caused the bus in which plaintiff Rose Kramer was then riding to leave the highway or to turn over or to fall down any steep embankment;" denied that plaintiff was in the exercise of due care for her own safety, denied that it was guilty of any negligence which resulted in injuries to plaintiff, and denied substantially all charges made against it. The other defendant, Illinois Safe Way Lines, Inc. in its answer denied that at the time in question "it was engaged in the business of operating any automotive passenger buses as a common carrier;" averred that "its only business is the ownership of automotive buses which are leased by it to corporations which are engaged in the business of operating said buses as common carriers." The answer then adopts substantially the answer of the

other defendant.

Plaintiff's evidence is to the effect that she purchased a ticket in New York, boarded the bus about eight o'clock in the morning for Chicago; that about an hour after the bus left New York City it reached Kearney, N. J., where the driver stopped at a gas station and announced to the passengers that something was wrong with the mechanism of the bus and that he would telephone the company's New York office; he went into the gas station, talked on the telephone to the vice-president of the bus company and told him that the gear was out of shift; that the bus was not in running condition and that he would not take it any further; that one of the passengers at that time also spoke to the vice-president, saying "that the bus was a death trap that he was sending on the road, and that if it did go on it would never reach its destination." The driver then again talked to the vice-president.

The evidence further shows that a mechanic and another driver came from New York to Kearney, having been sent by the company. They examined the bus and told the passengers there was nothing wrong with it. The new driver then took his place and drove the bus until about 7:30 o'clock in the evening, stopping along the way at the usual stopping places.

The evidence further tends to show that there were some snow and slush on the road; that the road before and at the place of the accident was straight and level and paved for three lanes of traffic; that there was no traffic at the place in question; the bus was being driven on the right hand lane about 40 miles an hour, when it suddenly turned toward the left, ran across the pavement and over the soft shoulder and turned over. Neither of the two drivers nor the mechanic who came to Kearney, nor anyone, testified as to the condition of the bus before or after the accident nor as to how the accident occurred.

other defendant.

Fairfield's attorney is to file written brief [illegible] a brief in New York, instead [illegible] ing for Chicago; [illegible] it [illegible] and [illegible] [illegible] to the [illegible] [illegible] Tork office; he [illegible] [illegible] [illegible] was not at all; that [illegible] [illegible] [illegible] he would not take it [illegible] [illegible] [illegible] time also [illegible] [illegible] [illegible] [illegible] it would [illegible] [illegible] [illegible] [illegible]

Defendants contend that the court erred in permitting counsel for plaintiff to introduce evidence as to the corporate structure of the two defendants, including the names of the officers, directors and stockholders, and to inquire as to whether defendants carried insurance; that the court's action in condemning counsel for defendants because he did not have his witnesses in the court room at the moment they were called, and imposing a fine of $100 upon counsel for contempt of court, was uncalled for, and that the attitude of the court tended strongly to prejudice the jury.

Near the conclusion of plaintiff's case her counsel sought to prove whether the defendants, or one of them, owned and operated the bus at the time in question. Counsel for defendants say this was improper because, "There was no denial in the pleadings of the ownership of the bus nor operation of it at the time and place of the accident ***.

"The defendant Safe Way Lines, Inc., admitted that it operated the bus *** and Illinois Safe Way Lines, Inc., admitted that it owned the bus *** Therefore the pleadings cast no burden upon the plaintiff to prove the ownership and operation of the vehicle ***.

"In order to remove any possibility of doubt as to this question, counsel for the defendants stated in open court that Safe Way Lines, Inc., operated the bus and Illinois Safe Way Lines, Inc., owned it." We think this contention is not borne out by the record.

The record discloses that counsel for plaintiff about a year before the trial endeavored to take depositions on the question of who owned and operated the bus at the time but was unable to do so because the witnesses refused to answer. At that time counsel for defendants appeared and apparently prevented the witnesses from answering the questions. On the trial counsel for plaintiff said, "Is it the Indiana corporation that owns the bus or is it--"

Defendants' counsel, Mr. Pegler: "Well, the answer of the Illinois corporation sets up that it owns the bus but does not operate it." Mr. Kahn: "Which one operates, according to the answer?" Mr. Pegler: "Safe Way Lines sets up that it operates buses but does not own them." Mr. Kahn: "I just wanted to get it straight. Illinois Safe Way Lines, according to the answer, is the one that owns this bus?" Mr. Pegler: "Whether they own this bus or not"--- Mr. Kahn: "It is not denied in the answer." Mr. Pegler: "We deny they operate any buses." Plaintiff then called witnesses endeavoring to discover the ownership and operation of the bus by inquiring as to the insurance. Substantially all of this was out of the hearing of the jury. But there was more or less quibbling and evasion by the witnesses, upon objections by defendants' counsel. The evidence touching the insurance was not improper. Watson v. Tringe, 274 Ill. App. 379.

There is some evidence to the effect that the bus companies were insured by an insurance company of Kansas City which had an office in Chicago, but that the policies were in New York. A great deal of time was taken up by defendants' counsel in evading the issue and the court then said: "Now, Mr. Pegler, you are an officer of the court and I think it is your duty to inform us which company operated that bus and who insures it.****" Mr. Pegler: "If I was put under oath I would not be able to tell you, your Honor." The Court: "I am not going to get around to this step if it is possible to avoid it. I do not want to use the drastic power of the court to get a matter of information available. You may or may not be liable. Now, if there is no liability, you should go to the jury on that, and not on the theory that you are going to juggle three companies operating buses across different states.*****" Mr. Pegler: "I think your Honor is under the wrong impression altogether. As I have understood the pleadings, there is no question about this---

The Court: "All right, which one?" Mr.Pegler: "As I intrepret the pleadings and answer, Illinois Safe Way Lines did not operate the bus in question." The Court: "But it owns the bus in question, is that right?****" Mr. Pegler: "To be frank with you, I rather think it does, but I don't think the ownership of the bus cuts any figure. ***" Mr. Kahn: "Will you stipulate that company did own this particular bus on the particular day?" Mr. Pegler: "I would be glad to if I knew for sure,**** I have always maintained that our answer here in substance admits operation of the bus because we did not deny it. Of my own knowledge I do not know anything about it except what I am told and that is what we put in the answer." More of this appears in the record. Witnesses were called who were connected with insurance companies. One of the members of Mr. Pegler's firm was called; he was connected with the Markel company which had offices adjoining their law firm, and investigated similar cases for defendants, but little or no information could be adduced from this witness. It is clearly apparent that all questions that sought to elicit which defendant owned and which operated the bus at the time were continuously evaded. In this connection counsel say: "In asking the court to judge as to whether or not the action of the trial court in fining defendants' counsel $100 for contempt of court was justified, we can only refer the court to the record." This question is not before us. The only question is as to whether defendants had a fair trial in the personal injury case. We may say we think the court showed a great deal of patience and forbearance, for it is apparent that defendants' counsel was not at all frank, but on the contrary his answers and those of the witnesses subpoenaed on this question were clearly evasive.

In Princell v. Pickwick Greyhound Lines, 262 Ill. App. 298, which was a personal injury case where a question somewhat similar

to the one before us was involved, the court said (p. 310): "The plaintiff is fully warranted in the argument that 'the obvious purpose of the defendant in printing the unreadable name of the other company on the ticket, and in concealing it between the words comprising defendant's corporate name, was to deceive the public and to enable it to shift responsibility in the event of injury to its passengers.' A common carrier must be honest and fair in its dealings with the public." In the instant case the defendants, or one of them, was a common carrier and should have been honest and fair in its dealings with the public as to who owned and operated the bus at the time, but the record shows the contrary. So far as the evidence discloses, there was no defense to this case. Substantially all of the evidence and argument on the question of who owned and who operated the bus was out of the hearing of the jury, which was also the fact when the court imposed the fine. In such case there should be no equivocation as to who owns and operates a public conveyance.

Complaint is made that the court erred (1) in allowing a witness to testify to conversations with the driver who operated the bus from New York to Kearney, N. J.; (2) in permitting portions of the depositions of witness Nash to be read to the jury; (3) in refusing to permit defendants' counsel to examine certain witnesses with regard to statements they made and signed on the day after the accident, unless the witness who wrote up the statements was produced; (4) in permitting counsel for plaintiff to examine defendants' witness Culp concerning matters not brought out on cross-examination, and which were not relevant.

(1) The testimony of the witness was to the effect that the driver of the bus from New York to Kearney said that the bus was in bad order and that he would not drive it any farther; that he stopped at Kearney and then telephoned the New York office. We

think this evidence was clearly competent as tending to show that the bus was not in a good state of repair, that defendants knew it, and that the accident which happened that evening might have been caused by the condition of the bus. (2) Nash, the State Highway Patrol, testified that he was notified of the accident shortly after it occurred; that he rode to the scene of the accident on his motorcycle, a distance of a mile and a half or a mile and three-quarters; that it did not take him long to get there; that he assisted in taking some of the passengers from the overturned bus; that he talked with the bus driver as to how the accident occurred; that the driver said "he thought he fell asleep." Whether this conversation was so near to the time of the accident as to be a part of it, and therefore admissible in evidence, we think was a question for the trial Judge in his discretion. No rule can be laid down that will fit all such circumstances. But in any event defendants were not materially prejudiced by this testimony because no defense was interposed. The undisputed evidence is that the bus did run across the pavement and turn over. This made out a case of negligence, if unexplained, and there is no explanation except that counsel for defendants argues that the roadway was icy and slippery at the time. But we think the evidence is entirely insufficient to show that the bus slipped or skidded on account of ice. (3) The evidence shows that shortly after the accident Samuel Culp, who for defendants investigated the facts in connection with the accident, testified he lived about 70 miles from Lewistown and went to that city to investigate, arriving there about one o'clock the night of the accident; that the next morning he talked with Miss Patt, Mrs. Sachtman and Mrs. Moulton, three passengers injured and who were then in the hospital, and procured a statement from each which he wrote out and had each sign. The court refused to permit these statements to be offered in evidence unless counsel for defendants produced Culp.

Later Culp was called and testified, and the statements were then received in evidence. We think the ruling of the court was entirely proper and are unable to see how it could be said to prejudice defendants. The contention of counsel for defendants, that the attitude of the court was hostile because of statements made by the court when it was sought to introduce these statements, we think could in no way affect the result of the suit, because the statement of the court was made out of the presence of the jury. (4) When counsel for plaintiff was cross-examining this witness, Culp, concerning his investigation and the procuring of statements by him above mentioned, counsel inquired in regard to a Mrs. Moyer. The witness did not recall her. Counsel then produced a newspaper to refresh his recollection; and also exhibited a deposition taken in connection with another case growing out of the same accident, but this was not read to the jury. The witness was interrogated on these matters, not only to refresh his recollection but as tending to affect his credibility by showing the interest he had in making the investigation. We think the examination was not improper and did not prejudicially affect defendants.

At the close of plaintiff's case, about 11 o'clock a. m., March 10, 1937, after the usual motions made by the defendants for a verdict had been overruled, counsel for defendants stated that the driver of the bus (at the time of the accident) had not appeared, and presented a motion in writing for a continuance of the cause. The court denied the motion and it is claimed that this was prejudicially erroneous. The affidavit in support of the motion was by Mr. Pegler, the substance of which was that Earl Perry, driver of the bus at the time of the accident, lived in New York City; that Mr. Pegler, through his agents, had, within the last few weeks, located Perry at Worcester, Mass., and had made arrangements to

have him come to Chicago to testify when notified by telegram to do so; that Mr. McGowan, the agent in the east, wired March 5 to Mr. Seddon in Chicago that he was arranging to have Perry come and testify, giving Perry's address in Worcester, Mass.; that on the same day Seddon wired McGowan to have Perry come to Chicago either March 8th or 9th, - "advise if you advance any expense money"; that the next day McGowan wired: "Perry will arrive your office Monday*** advanced thirty-five dollars;" that on the 9th Seddon wired McGowan inquiring the time Perry would arrive and was advised the same day, "Perry's place of employment advised he left Sunday night for Chicago." The affidavit of Mr. Pegler further set up that they were still actively trying to locate Perry, "but due to his sudden disappearance *** he cannot be located today, it is doubtful whether his presence can be secured in time to testify;" that affiant's agents cannot account for his "sudden disappearance;" that if Perry were present he would testify that prior to the accident he was employed by one of the defendants as a bus driver; that he had been driving buses several years both on the open road and in the City of New York; that on the morning in question he relieved another driver at Kearney, N. J., and drove from there to the place of the accident in Pennsylvania; that the roads were covered with snow and ice; that he reduced the pressure of the four rear tires to 35 pounds in order to obtain better traction; that there were dual tires on the rear of the bus which was a 12 passenger bus; that this "was better practice than putting chains on the wheels in view of the wet and icy condition of the road;" that he drove the bus without any skidding until he reached a point about two miles east of Lewistown at about 7:30 p. m., when he was driving about 30 miles an hour; the weather was misty, foggy and the road covered with slush which was beginning to freeze and was very slippery in spots; that the visibility was

fair; that the bus "skidded suddenly and without warning to the left of the road; that he immediately started to straighten it out but was unsuccessful; that the bus skidded on to the soft shoulder on the south side of the road where there was no guard fence; that the soft shoulder gave way and the bus turned over." This affidavit purports to be sworn to on the 4th day of March, 1937, but the date is apparently a mistake because the motion was made March 10, 1937.

When the motion for continuance and the affidavit of Mr. Pegler in support of it were submitted on hearing, counsel for plaintiff submitted a counter affidavit setting up that on March 4 counsel for defendants submitted an exact copy of the affidavit made by him to Judge LaBuy, the assignment judge, requesting a continuance; that thereupon Judge LaBuy continued the trial until March 8, when the case was called at that time before Judge Trude and both counsel answered they were ready. Counsel for defendants say the court refused to read the affidavit in support of the motion, but we think the record shows that the contents of the affidavit were discussed fully by counsel, so that it was understood by the Judge when he denied the motion for a continuance.

While, obviously, the driver of the bus was an important witness for defendants, we think it is not at all clear that defendants used due diligence to have him testify. They might, as the court said, have taken his deposition, and a consideration of all the record leads to grave doubt as to whether Perry would ever appear as a witness. It appears that March 10 defendants moved for a continuance; March 19 their motion for a new trial was filed, which was not overruled until April 17, but nowhere is it suggested that Perry had been found. We think the court was right in overruling the motion.

It is also claimed the court erred in permitting Mrs. Moulton, who was one of the passengers injured in the accident, to describe in detail the injuries she sustained. This examination was permitted for the purpose of showing Mrs. Moulton's condition at the time Culp obtained the written statement signed by her. We think the testimony would clearly indicate that Mrs. Moulton was in no condition to give any statement at the time. And the jury had a right to know this in passing upon the weight to be given to the three written statements prepared by Culp at the time, to which we have above referred.

Complaint is also made that the argument of counsel for plaintiff was highly prejudicial; that it caused plaintiff to weep in the presence of the jury. We have examined the arguments of both counsel appearing in the record, and the arguments in the briefs, and are of opinion that we would not be warranted in disturbing the verdict and judgment.

Nor do we think there is merit in the contention that the verdict and judgment against defendant Illinois Safe Way Lines, Inc., is not supported by any competent evidence. Counsel admits the bus was owned by this defendant but operated by the otherdefendant, and there is evidence to the effect that the bus was out of repair. In these circumstances we think both would be liable. C. & N. I. R. R. Co. v. Schmitz, 211 Ill. 446; Pa. Co. v. Elliott, 132 Ill. 654; 1 Cooley on Torts, sec. 88 (4th ed.)

Defendants further contend that the judgment is so excessive as to demonstrate that it resulted from passion and prejudice rather than from a fair and impartial trial. Dr. Black, who first treated plaintiff after she was taken to the hospital at Lewistown immediately after the accident, testified he treated her at the hospital for about seven weeks, when she was able to leave

for her home in Chicago; that upon examination he found plaintiff suffering from profound traumatic shock; that he could not take X-rays of her until two or three days later; that these pictures revealed a transverse fracture near the middle of the chest of the left clavicle, displacement of the top of the shoulder, also fractures of her ribs on the left side near the spinal attachment; that he reduced the fractures and placed the arm in splints for a week, when they were removed; that she would have permanent deformity and disability; that when she left the hospital she could raise her left arm sufficiently to feed herself.

Dr. Leventhal of Chicago testified that he treated plaintiff for about three months; that when he first saw her he found a limited motion of the left shoulder joint in all directions and knuckling of the bone in the left clavicle; that he also found fracture of the 1st and 2nd ribs; also the 6th and 7th ribs on the left side; that he last examined the patient on the day of the commencement of the trial, March 8, 1937, more than two years after the accident; that he still found limited motion of from 50% to 65% in the left shoulder in rotation forward and backward; that he also found plaintiff still had pain in her chest due to a form of neuroma, a bulbous formation on the intercostal nerve in the region of the second and third ribs at the site of the fractures; that her condition would be permanent.

Dr. Mitchell of Chicago testified that the X-rays revealed the fracture of the collar bone was in bad position, as were the healed fractures of the ribs; that he found the limitation of plaintiff's left shoulder to be about 50%, that the condition was permanent, and that plaintiff would continue to have pain.

Upon a consideration of all the evidence in the record we

are unable to say that the verdict of the jury is so excessive as to warrant interference on our part, and the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

39820

BENJAMIN F. J. ODELL,
Appellant,

vs.

EARLE G. WAHLGREN, HILLA WAHLGREN and RIGGS OPTICAL COMPANY, Consolidated, a Corporation,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 611[3]

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

June 23, 1934, plaintiff brought suit against Earle G. Wahlgren to recover $10,000 claimed to have been earned by plaintiff for legal services which he had rendered Wahlgren. Hilla Wahlgren, wife of Earle G. Wahlgren, and the Riggs Optical Company, Consolidated, a corporation, were joined as defendants and plaintiff prayed an injunction to restrain assigning, pledging or transferring of 100 shares of stock in the Riggs Optical Co., which plaintiff claimed belonged to defendant, Earle G. Wahlgren. At the same time plaintiff sued out a writ of attachment in aid and filed an affidavit in which he swore that the Wahlgrens were residents of Omaha, Nebraska, and Riggs Optical Co., a foreign corporation, doing business in Chicago, was served as garnishee. Plaintiff filed interrogatories concerning the 100 shares of stock which he claimed Wahlgren or his wife owned. The Optical Company answered that it had no property belonging to Wahlgren, but that it had issued its two certificates of stock, one for 80 shares on December 30, 1922, and the other for 20 shares on March 15, 1923, but that it did not know the whereabouts of the certificates. An order awarding a writ of injunction as prayed for was entered. Many other orders were entered, unnecessary to mention here. The case was transferred to the law side of the court, and on June 15, 1937, the court entered an order reciting that the matter came on to be

heard on motion of Earle G. Wahlgren to quash the writ of attachment or, in the alternative, to discharge the garnishee, the Riggs Optical Co. The court found that the Optical Co. had made full disclosure in its answer and that at the time, "of the making of said motion no traverse to said answer had been filed by the plaintiff herein nor any issue otherwise made on said answer." The motion to quash was denied and it was further ordered that the alternative motion of Earle G. Wahlgren to discharge the garnishee be allowed and the garnishee was discharged. It is to reverse this order that plaintiff prosecutes this appeal.

Earle G. Wahlgren alone filed his brief in this court. Rilla, his wife, did not enter her general appearance and the Riggs Optical Co. has not appeared here. Earle G. Wahlgren set up in his answer that he did not own the stock in question but that it belonged to his wife and had been her property for many years before the instant suit was brought.

Counsel for Wahlgren in their brief say, "The case was argued in the court below on the question of law raised by the answer of the garnishee setting forth that the principal defendant appeared as a stockholder of record of the garnishee corporation. Without a traverse to the answer, it was proper to discharge the garnishee on the facts disclosed in the answer. (Deffenbaugh v. Andrew, 91 Ill. App. 142.

"Not until long after the completion of the argument was it pointed out to the court that a traverse had been filed - a traverse filed on the day the argument was completed. To permit this traverse to be now used to support a plea of error in the judgment below would permit the perpetration of a fraud upon the court. The court below properly recognised that the traverse was unavailing, reciting in the order appealed from that no traverse was on file at the time the

motion to discharge the garnishee was presented and argued."

The record is somewhat confused but counsel for Wahlgren say that the motion to quash the attachment and to discharge the garnishee was made by Wahlgren November 30, 1936, and apparently argued on that date; that it was further argued December 8, following. On the same date plaintiff filed his reply, traversing the answer of the garnishee. Afterward both parties filed typewritten briefs with the court, which are in the record (a rather anomalous method.) In each of these briefs the question of the traverse is discussed and counsel for Wahlgren say that the answer should have been filed within 20 days, but was not filed for many months after the garnishee's answer, and therefore came too late; but no such point is made in the brief filed here, so this contention is waived. The traverse having been filed December 8, 1936, and briefs thereafter by both sides, and the order appealed from not having been entered until June 15, 1937, we think the court was not warranted in passing on the question as a matter of law, but the pleadings raised a question of fact. Whether the stock certificates could be reached by garnishment depends upon the facts. Alexander v. Live Stock Bank, 282 Ill. App. 315.

The judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

39901

FRANK E. MERRILL,
Appellee,

vs.

EUNICE M. MERRILL,
Appellant.

FOREMAN-STATE TRUST AND SAVINGS BANK, a Corporation, and CHARLES H. ALBERS, Receiver of Foreman-State Trust and Savings Bank, Co-Defendants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

294 I.A. 611

MR. JUSTICE McBURNEY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his bill seeking an accounting; the master in chancery made an accounting and found that nothing was due plaintiff and recommended that the bill be dismissed; exceptions to this were sustained by the chancellor, who entered a decree against Eunice Merrill, defendant, in the sum of $64,543.30, from which she appeals.

The Foreman-State Trust and Savings Bank, and Charles H. Albers, Receiver of Foreman-State Trust and Savings Bank, are the successors to the State Bank of Chicago, hereafter called the trustee. The decree appealed from does not affect them.

In 1926 plaintiff and defendant, then husband and wife, entered into an agreement for the purchase, subdivision and sale of a tract of land near Palatine, Cook county, Illinois; the undertaking contemplated that defendant would pay for the real estate and plaintiff would subdivide and sell the lots; defendant obtained the funds necessary for the purchase from her brother, Mr. McIntosh, borrowing $54,888.39, giving him her note for this.

February 1, 1926, the parties signed what is called a trust agreement which should control their dealings. This provided that the State Bank of Chicago, called trustee, which had taken title to the land, should hold it in trust and deal with it as directed by

3460

JAMES E. BENNETT,

Appellee,

vs.

BESSIE S. BENNETT,

Appellant.

Appeal from Superior Court of Cook County, Illinois, Chancery Division, Hon. Edward F. Dunne, Judge Presiding.

Mr. JUSTICE [illegible] delivered the opinion of the court.

Plaintiff filed his bill, praying to be divorced, the matter in question, all [illegible] being had during the pendency of the litigation, and [illegible] by stipulation; [illegible] was entered by the chancellor, the court finding a master duly appointed by the chancellor, [illegible] Upon this [illegible] appeal.

The [illegible] Court [illegible], and [illegible] Albert, Executor of [illegible] Estate and [illegible], for the accountants in the State Bank of Chicago, [illegible] the [illegible]. The [illegible] [illegible].

In June [illegible] [illegible], [illegible] [illegible] [illegible]

plaintiff (called manager) or the defendant (called beneficiary); the manager had exclusive right to sell the lots in the subdivision at not less than certain fixed minimum prices; the sales contracts were to be held by the State Bank as trustee and the payments made by purchasers should be made to it; the manager should receive 28 per cent of the purchase price of the lots sold by him as the manager's commission; it was provided that the balance of moneys received by the trustee from the purchasers, after paying the trustee's charges, should be set aside as a sinking fund, and that when, after paying certain charges hereinafter stated, there should be in the sinking fund any excess, the trustee was to pay one-half to the beneficiary, defendant, and one-half to the manager, plaintiff, "until the Manager shall have received an amount equal to one-half of the net profits from the sale of the subdivision lots sold by him under the provisions hereof, and thereafter all such excess shall be paid to the Beneficiary."

The items to be paid from the sinking fund before there could be any division between the manager and the beneficiary are listed in the agreement as taxes and assessments, interest upon notes given to secure any mortgage, a sufficient amount to secure a release of the subdivision lots from the lien of any trust deed, note of defendant for $54,888.30 to the order of Arthur T. McIntosh, with interest upon the note, and the repayment of moneys advanced by defendant under the provision in the agreement of section 2, article 5, that when the moneys held by the trustee are not sufficient to pay the charges and expenses, the beneficiary agrees forthwith to pay the trustee the amount necessary. There was a further provision in the agreement defining "net profits," which were to be determined by the selling price of the lots less cash discounts allowed to purchasers, the manager's commissions and the items above listed. Sec-

tion 5 of article 6 provides that the trustee shall pay to the beneficiary and the manager on the 15th of each month during the continuance of the trust agreement such an amount as may be due them "after all the charges and deductions herein provided for have been fully paid."

It is the contention of defendant, and the master so found, that after these deductions and charges had been made from the amount in the sinking fund there was nothing to be divided between the manager (plaintiff) and the beneficiary (defendant.) We will later refer to this.

The trust agreement also contained a provision giving the beneficiary the right to terminate the employment of plaintiff as manager to sell subdivision lots, by giving 180 days previous notice of such termination. It was also provided that the trust agreement should continue in full force and effect after such discharge of plaintiff as manager; that the beneficiary may appoint a new manager but that the termination of the authority of plaintiff as manager to sell subdivision lots should not affect his rights to receive his commission as herein provided for to be paid to the manager on lots theretofore sold. Due notice under this provision of the termination of plaintiff's authority as manager was given, the expiring day being May 1, 1929.

The master stated the trustee's account, including the total contract sales up to May 1, 1929, after deducting certain fraudulent contracts made to plaintiff's friends, and assuming that all of the bona fide contracts were on a cash basis, would leave a credit balance of $253,300.47. Computing the charges which, according to the trust agreement must be paid before there can be any net profits in the sinking fund, these total $258,979.05. So, even estimating the sales contracts on the basis of cash, which was far from the facts, there would still be a deficit in the sinking fund of

$5678.58 and nothing to be divided as profits.

It is undisputed, as found by the master, that on May 1, 1929, defendant was indebted in the sum of over $64,000 on the McIntosh note, which, under the trust agreement must be paid from the sinking fund before any profits are paid, and that there was no money in the sinking fund to pay this; that defendant had advanced to the trustee at its request, for the payment of special assessments and taxes, over $56,000, for which defendant had not been reimbursed and which the sinking fund could not pay, and defendant made further advances in behalf of the trust for which she had not been reimbursed The master found that the agreement provided that the defendant, whose money and credit financed the enterprise, had the right to terminate plaintiff's authority as manager without paying him any profit in addition to his 28 per cent commission, "unless and until the sinking fund was sufficient to cover all of the charges listed" in the trust agreement.

Obviously, it was contemplated that the sinking fund in the hands of the trustee should come from cash actually received. As we have seen, the master found that even assuming that all the contracts were cash, there was an actual deficit. The evidence shows, however, that 95 per cent of the subdivision has been sold for taxes or special assessments, and the installment subdivision contracts, amounting to over $60,000 outstanding, were, at the time of the hearing before the master, two to nine years in default. It should be noted that at the time of the hearing before the master the total actual loss to defendant from this adventure was nearly $117,000. How, then, can the decree against her of over $64,000 be justified?

Plaintiff's theory, followed by the chancellor, is that when defendant gave notice of the termination of plaintiff's authority as

manager, effective May 1, 1929, that had the effect of terminating the joint adventure on that date, thus limiting the joint enterprise to the lots sold up to that date; that plaintiff was entitled to an accounting as of that date and that there should be charged to the joint adventure only items of cost, expenses, taxes, etc., with reference to the sold lots on May 1, 1929, and not such costs incurred with reference to the entire number of lots in the tract. We are of the opinion that this method of accounting is improper as directly in conflict with the provisions of the trust agreement.

The fallacy in plaintiff's position is in the assumption that the trust agreement was terminated and ended when plaintiff was removed as manager. Section 7 of article 4 of the trust agreement, which provides for the termination of the authority of plaintiff to sell subdivision lots, specifically provides that "this Trust Agreement shall continue in full force and effect.." Section 2 of article 6, which provides for the sinking fund for moneys received by the trustee, specifies that the charges and expenses there itemized are to be paid from the sinking fund before there is any distribution. Section 4 of article 6 provides that after the specified expenses have been paid then the trustee shall divide any excess between plaintiff and defendant. It is clear that, beyond his 25 per cent commission, plaintiff is entitled to nothing unless there are moneys in the sinking fund in excess of the charges and expenses specified in section 2 of article 6. Consistent with this is the further provision in section 5 of article 6 that the trustee shall pay to plaintiff and defendant amounts due them "after all the charges and deductions herein provided for have been fully paid."

It would seem to be self-evident that there could be no division of profits until all expenses and charges incurred should be repaid and the repetition in the trust agreement of this provision leaves it beyond room for controversy that the provisions of the

trust agreement, and especially those with reference to the division of profits, still continued to control regardless of when the authority of the manager to act as salesman should be terminated. To hold otherwise is to ignore the well established rule that in construing contracts effect will be given, if possible, to each clause, phrase and word used in the contract, as it is presumed that the parties meant something by the use of the particular language used. Green v. Ashland State Bank, 346 Ill. 174, 182. It is also the rule that when parties have by their contract agreed as to the method of taking the accounts, this will be held to furnish the true rule controlling the accounting. As was said in Pearce v. Pearce, 77 Ill. 284, 286, the court is bound to state the account according to the agreement of the partners. A court of equity cannot substitute a different contract from the one made by the parties themselves. Clark v. Muir, 298 Ill. 548, 560.

The trial court, apparently, was of the opinion that to enforce these provisions of the trust agreement was unfair to plaintiff. We do not agree with this. Defendant financed the entire enterprise, and why should plaintiff, who has already received 28 per cent as commissions in cash, receive any alleged profits before defendant receives any of the amount she invested? Why should plaintiff be entitled to profits and the defendant left with a fading hope of receiving any return of the moneys advanced by her? As we have noted above, she has already suffered a loss of over $100,000.

Other considerations, which it is unnecessary to discuss, also lead us to the conclusion that the trial court erred in sustaining the exceptions to the master's report and in entering the instant decree.

The decree is therefore reversed and the cause is remanded with directions to dismiss plaintiff's amended bill of complaint in accordance with the recommendation of the master in chancery.

REVERSED AND REMANDED WITH DIRECTIONS

O'Connor, P. J., and Matchett, J., concur.

39916

ARMIN F. HILLMER and KATIE SACK,
Appellants,

vs.

ROBERT J. GRAF, CHICAGO BANK OF COMMERCE, an Illinois Banking Association, et al.,
Appellees.

OSCAR ENGELHARD and J. F. ARMITAGE,
Appellants,

vs.

ROBERT J. GRAF, CHICAGO BANK OF COMMERCE, an Illinois Banking Association, et al.,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

294 I.A. 612

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order authorizing the receiver of the Chicago Bank of Commerce, in process of liquidation, to accept from Robert J. Graf $56,250 in full settlement and discharge of his liability as a stockholder in an amount of $134,563.20, as found by the master.

In May, 1934, proceedings were commenced against the stockholders of the Chicago Bank of Commerce to enforce the stockholders' superadded constitutional liability. Section 6, Article 11, Constitution of Illinois. Robert J. Graf, one of the stockholders, filed an answer, and the master in chancery to whom the cause was referred for hearing reported that Graf was liable in the amount of $134,563.20; afterward Graf, by petition, offered to pay $56,250 in full settlement and satisfaction of his liability as a stockholder; plaintiffs answered to the effect that this offer could not be accepted without a clear showing of insolvency of Graf. The receiver recommended that the proposition be accepted.

Without hearing any evidence, and over the objections of

counsel for plaintiffs the court granted the prayer of Graf's petition and entered the order that this proposition be accepted. Plaintiffs appeal from this order.

In the recent case of Burket v. Reliance Bank & Trust Co., 367 Ill. 196, it was held that a trial court has no power to discharge a stockholder of an Illinois bank from any part of the liability imposed by the constitution without proof by the stockholder of his insolvency, and that any order discharging the stockholder from liability upon the payment of a sum less than that imposed by law is erroneous and void. See also, involving the same point, the opinion in the case of Gardner v. Auburn Park Trust & Savings Bank, Gen. No. 39499, filed in this court December 15, 1937.

The order in the instant case was entered before the decision in the Burket case was rendered, and the trial court indicated some doubt as to his power to enter the order appealed from.

Counsel for Graf in his brief suggests that plaintiffs consented to the order and are therefore estopped from now objecting. The record does not bear this out. The order itself shows plaintiffs objected and excepted to the entry of the order. Other points made are likewise without merit.

In the order appealed from the liability of Graf is stated as $75,000. The master fixed his liability at $134,563.20. In the reply brief plaintiffs say they did not argue the question as to the actual liability of Graf in the trial court nor in their original brief filed in this court as the order appealed from was manifestly erroneous in discharging Graf from liability upon the payment of a sum less than the liability of $75,000 admitted to be due, and that this court should be confined to the actual issue in the trial court, namely, the validity of the order discharging Graf.

Following the Burket case, we hold that that part of the decree authorizing the receiver to satisfy the liability of the

defendant Robert J. Graf upon the payment of $56,250, is erroneous and it is reversed. The cause is remanded with directions for such further proceedings as may be necessary consistent with what we have said in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Matchett, J., concur.

39961

In the Matter of THE ESTATE OF CARRIE AUMER, Deceased.

ELIZABETH STEGGERS, Appellant,

vs.

ESTATE OF CARRIE AUMER, Appellee.

47A

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 612

MR. JUSTICE McSURELY DELIVERED THE OPIAION OF THE COURT.

Elizabeth Steggers filed her claim in the Probate court in the Estate of Carrie Aumer, asserting that certain notes aggregating $5000 had been received by Carrie Aumer from her husband, Joseph Aumer, deceased, in trust for the claimant; upon hearing in the Probate court the claim was disallowed; appeal was had to the Circuit court where, after a hearing by the court without a jury, the claim was again disallowed and claimant appeals to this court.

Carrie and Joseph Aumer were husband and wife; both had been previously married; there were no children by either marriage. Joseph Aumer died intestate August 1, 1930; his estate was not probated. Claimant attempted to show that Joseph Aumer had lent $5000 to the Society of the Divine Word at Techny, Illinois, a Catholic religious order, for which notes had been given to Joseph and Carrie Aumer jointly; that shortly before the death of Joseph he entered into an oral agreement with his wife Carrie that the $5000 lent to the Society of the Divine Word and evidenced by notes should be paid by Carrie to the claimant, Elizabeth Steggers, his widowed sister, so that she might pay off an existing $5000 mortgage on her home.

Carrie Aumer died April 2, 1933, not having delivered to claimant the $5000 in notes; she left a will bequeathing $300 to

In the matter of THE ESTATE OF
DANIEL ADAMS, Deceased.

ELIZABETH EDWARDS,
Applicant,

vs.

MARIE OF DANIEL ADAMS,
Caveator.

294 I.A. 612

the claimant; also bequeathed $3000 to the Society of the Divine Word of Techny, Illinois, to be used to educate a man for the priesthood - the remainder of her estate to be divided equally among her five nephews and nieces. Her estate was inventoried at something over $15,000, including a claim of $2000 which the executor testified was uncollectable.

Twelve witnesses testified on behalf of the claimant, five of them being her children. It would unduly extend this opinion to detail their testimony. In substance it was that at the time of the marriage of Joseph and Carrie Aumer, when they were at an advanced age, they were heard to make an oral agreement that out of Joseph's share of their joint property $5000 should be paid on his death to his sister, Elizabeth Steggers, the claimant, and that this was repeatedly reaffirmed up to the time of Joseph's death on August 1, 1930, and many times thereafter by Carrie; that both Joseph and Carrie had repeatedly stated that the money to be paid the claimant was evidenced by notes signed by the Society of the Divine Word. The witnesses do not agree in their testimony. Some said that Joseph Aumer had promised to leave his sister $5000 in his will. Anthony Steggers, son of the claimant, testified that the agreement between Joseph and Carrie Aumer was that their property was to be divided equally - "one-half to one side and one-half to the other side." Another son of claimant testified that Joseph Aumer said to him the day before he died that he had left money for claimant and all of the children. All witnesses seem to agree that both Joseph and Carrie expressed an intention to leave something to the claimant by will. The entire case of claimant rests upon rather loose and casual statements alleged to have been made by both Joseph and Carrie Aumer.

In Deles v. Leahy, 278 Ill. App. 178, 181, we said: "It

has long been well settled that courts lend a very unwilling ear to statements of witnesses as to what dead people have said." Very few of the witnesses pretend to give the particular phraseology used, and all are testifying to loose expressions occurring several years before the giving of their testimony. Parol evidence to establish a trust must be clear, strong and unequivocal, and although the statements of a deceased person may be of such nature as to base thereon a conclusion that a trust arose, "yet these declarations must be direct and certain, and, to be controlling, should be corroborated by other facts and circumstances, for courts will not act upon mere declarations if they are conflicting, vague or inconsistent with themselves." Baughman v. Baughman, 283 Ill. 55, 66.

There are a number of circumstances that negative the theory of claimant of a resulting trust. Joseph and Carrie Aumer were married in 1918, and they lived together until August 1, 1930, when Joseph died. Claimant took no steps after the death of Joseph to compel Carrie Aumer to account for the alleged trust fund of $5000 which she claims was established by Joseph before his death; this claim was first filed in the Estate of Carrie Aumer on February 5, 1936, almost six years after the death of Joseph Aumer and almost three years after the death of Carrie Aumer. This in itself is a strong circumstance against claimant's claim.

Moreover, the will of Carrie Aumer was admitted to probate June 12, 1933; November 28, 1933, claimant filed her first claim against the estate of Carrie Aumer, which she asserted was based on the contract and promise of the deceased to will her the sum of $1000. April 13, 1934, this claim was amended to read that her claim was based on the indebtedness of the deceased to claimant in the sum of $1000. May 15, 1934, another claim was filed, asserting a contract and promise of the deceased to will the claimant the sum of $5000, and a jury trial was demanded.

June 26, 1934, upon the hearing in the Probate court of the claim of $1000, it was disallowed.

February 5, 1936, claimant filed an amended claim in lieu of the prior $5000 claim, stating that her claim was for certain notes aggregating $5000 received by deceased from Joseph Aumer, in trust for claimant. The Circuit court Judge who heard the case commented upon these various claims, saying that it was very plain that claimant was uncertain at all times as to the amount of her claim. The record amply supports this conclusion. If there was a definite understanding that the Society notes were to be turned over to claimant upon the death of Carrie Aumer, why should claimant have made other claims and not have made the claim of resulting trust until years after the death of Carrie Aumer?

There is no convincing evidence that the $5000 of notes in the Society matter represented any moneys of Joseph Aumer. Joseph for years prior to and subsequent to his marriage to Carrie, worked as a street cleaner for Lincoln Park; Carrie Aumer at the time of this marriage owned a store and flat building on Lincoln avenue in Chicago; she also owned furniture and some investments and kept roomers; shortly after their marriage in 1918 she conveyed this building to herself and Joseph as joint tenants and the title so remained until his death in August, 1930; subsequently, in July, 1931, she sold the property for $11,000, taking back first and second purchase money mortgages; the uncollected balance of this, amounting to $6500, formed part of her estate when she died.

Carrie Aumer was a devout Catholic. In 1920 money in small amounts was lent to the Society of the Divine Word at Techny, and its notes were issued to the order of Joseph Aumer and Carrie Aumer. The account with the Society was a joint account and so remained until after Joseph's death; after his death new notes for $5000

were issued by the Society to the order of Carrie Aumer; the notes were kept, prior to Joseph's death, in their joint safety deposit box, and after his death the notes to her order were kept, unendorsed, in her deposit box.

There is no evidence to warrant the conclusion that Joseph Aumer at his death owned the $5000 Society notes. There is no evidence that Joseph, prior to his marriage to Carrie, owned anything except his earnings as a street cleaner. It would require a considerable stretch of imagination to conclude that the Society notes all belonged to Joseph. The presumption, based on the evidence, is that the money lent to the Society was Carrie's and not Joseph's.

From these and other circumstances we are of the opinion the conclusion of the Circuit court in disallowing the claim was proper, and the judgment order is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

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39839

ARNOLD A. SCHWARTZ,
Appellee,

vs.

GEORGE L. BABCOCK and BANKERS TRUST COMPANY,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 612

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

I. February 26, 1934, Schwartz filed a complaint against Babcock and the Bankers Trust Company. The complaint was based on section 49 of the Chancery act (Ill. State Bar Stats., 1937, chap. 22, p. 249). The complaint was afterward amended and as amended in substance charged that on February 29, 1933, Schwartz recovered a judgment in the Circuit court of Cook county against Babcock for $7420, on which execution issued which was returned unsatisfied, etc., and that the Trust Company had in its possession property belonging to Babcock which should be applied to the satisfaction of this judgment.

On the same day the complaint was filed summons issued to the sheriff of Sangamon county and also to the sheriff of Cook county. The sheriff of Sangamon county returned the summons served on George L. Babcock and Bankers Trust Company, incorporated, by leaving a true copy with Latham T. Souther, agent, on February 27, 1934. The sheriff of Cook county returned the summons issued to him not found on March 19, 1934. August 13, 1934, another summons issued to the sheriff of Cook county and was returned by him August 20, 1934, not found as to both defendants. October 30, 1934, another summons issued to the sheriff of Cook county and was returned not found as to Babcock, the other defendant not being served by order of plaintiff's attorney. March 20, 1934, the Trust company filed its motion to quash the summons and set aside the service made on

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it in the Sangamon county on the ground that no officer or person prior to the issuance of the summons and made return or affidavit upon the writ that no agent or officer of the corporation could be found in Cook county. January 21, 1935, Babcock entered his appearance, filed a motion to dismiss the cause for the reason that the complaint was substantiallyinsufficient in law in certain respects as stated in the motion. Affidavits in support of and against these motions were submitted.

January 21, 1935, an order was entered giving Babcock leave to file another written motion to dismiss. Thereupon plaintiff obtained leave to amend his complaint, which was done. The motion of Babcock stated its grounds to be, first, that the parties were not designated as required by section 21 of the Practice act; second, that the judgment at law against Babcock was void for want of jurisdiction; third, that it appeared affirmatively plaintiff had not exhausted his legal remedies; fourth, that it appeared the execution issued on the original judgment against Babcock on March 30, 1933, was returned May 19, 1933, by the sheriff only after plaintiff filed an undertaking to waive damages which might accrue by reason of the return being made before 90 days from the issue of the execution. This motion of Babcock was supported by his affidavit and opposed by the affidavit of Stewart Reed Brown, attorney for plaintiff. July 13, 1935, the motion of the Bankers Trust Company to quash the summons, etc., was denied and defendant was allowed 30 days in which to file a motion to vacate this order. This motion to vacate was filed August 13, 1935. The grounds for the motion were stated to be, first, that it appeared of record that no officer or other person attempting to make service of the writ made return or affidavit upon the same that he could not in Cook county find any officer or agent of the Bankers Trust Company at or before the time of the purported service upon said company; second, that it appeared that no officer or other person attempted to make

another

execution.

service of the writ in Cook county or attempted to find any officer or agent of the Bankers Trust Company in Cook county prior to the purported service in Sangamon county; third, that plaintiff had adequate and complete remedies at law; fourth, that it appeared from the complaint that plaintiff did not exhaust his remedy at law prior to the filing of the complaint; fifth, that the complaint did not allege plaintiff was a creditor of Babcock on or before July 30, 1915; sixth, the complaint did not allege that plaintiff was a creditor of Babcock on or before September 26, 1931; seventh, that certain allegations of the complaint were immaterial and irrelevant; eighth, no facts are stated in the complaint to entitle plaintiff to the relief prayed; ninth, that the supposed amendment was unintelligible; tenth, that complaint failed to allege facts sufficient to state a cause of action; eleventh, that the complaint failed to inform Bankers Trust Company of the nature of any supposed claim against it. This motion was denied June 15, 1936, as well as the motion of Babcock and both defendants were ordered to file their answers within 20 days. They elected to stand by their motions, their default was taken and entered, and on June 17, 1937, the court after hearing the evidence entered a decree finding the recovery by plaintiff of judgment in the Circuit court on March 29, 1933, the issue of execution to the sheriff on March 30, and its return wholly unsatisfied; that the judgment was in force except for the sum of $201.55 collected on a garnishment; that the complaint did not exhibit collusion; that July 30, 1915, Babcock, principal defendant, executed and delivered a written document which provided that he had deposited with the Bankers Trust Company, a New York corporation, property and securities aggregating in value $500,000 in trust during the life of the donor, the income of which, amounting to approximately $28,000, was to be paid by the Trust company to the defendant annual

during his life, and at his death to his wife if she survived him, upon her death to their children, and in case Babcock should survive his wife and children then to persons he might designate by will; that the donor by the terms of the trust reserved the right to add to the trust estate by filing additional securities with the trustee and reserved the right from time to time to file with the trustee written request for the sale of such property, and the trustee should make such sales as requested, and in doing so be under no responsibility for any loss or losses incurred. The donor reserved to himself the right to direct the disposition of the stock of the 25,000 ordinary shares of Babcock & Wilcox, Ltd., of London, England, and the defendant, Bankers Trust Company, was authorized and directed to make such sales at such times and in such manner as George L. Babcock might direct by notice in writing; that the Trust company accepted the terms of the agreement, which was by the ninth paragraph thereof declared to be irrevocable; that Babcock executed two further instruments purporting to assign the income from the trust estate as indicated in the trust agreement of July 30, 1915, which was approximately $28,000 annually, both instruments being dated September 26, 1931; in one of these a portion of the $28,000 income was assigned to one Feickert, trustee, for the purpose of paying debts of Babcock, the names of the creditors not being mentioned; that the other instrument assigned $17,000 of the income to Feickert as trustee for the benefit of Babcock, Ruth K. Babcock and the children of George L. Babcock; that both these trusts were by their terms irrevocable and accepted by the trustee; that on June 20, 1932, in the Chancery court of New Jersey a bill of complaint was filed, stating that defendant George L. Babcock and Ruth F. Babcock on or about July 20, 1915, deposited securities aggregating $500,000 with the Bankers Trust Company, as trustee, and primarily for the purpose of paying income of $28,000 to the donor, George L. Babcock, during his life , and

thereafter to the members of his family; that in September, 1913, (1931) two further trusts were executed whereby one Feickert, as designated trustee, was intrusted with $17,000 of the $28,000 to be paid over to Babcock's wife and children; that the first trust made provision for the payment of interest on the debts of George L. Babcock, amounting to $170,000; that the creditors of George L. Babcock were pressing for payment, and George L. and Ruth F. Babcock were fearful that these creditors might by judgment, execution and sale dispose of the entire income, and such loss of income would result in great hardship; that July 20, 1933, a decree of court, to which the plaintiff was not a party, was entered whereby securities aggregating $183,900 were withdrawn from the corpus of the estate to pay the debts of George L. Babcock, and that no part or portion of the debt of plaintiff has been paid. It was ~~further~~ therefore decreed by the court that the trust agreement of July 30, 1915, and the remodeled trust of July 26, 1932, and the decree entered in the Court of Chancery of New Jersey did not constitute a matter of defense as a bar to the enforcement of plaintiff's judgment against Babcock and against the Bankers Trust Company, as trustee for George L. Babcock, holding property and assets, in which said George L. Babcock had an interest, liable for payment of the judgment of the plaintiff. It was therefore further adjudged and decreed that the Bankers Trust Company, as such trustee, was ordered and directed to deposit with the clerk of the court within ten days from that date the sum of $9232.40 in satisfaction of plaintiff's judgment, and that in default of such deposit an execution issue.

II. It is contended in the first place the original judgment was void for want of jurisdiction because the summons against Babcock, as drawn, was returnable to a non-existent term of court. It appears from the affidavits submitted for and against the motion that the suit at law was begun in December, 1932; that the summons

(evidently by inadvertence) was made returnable to the January term, 1932, of the Circuit court instead of 1933; that Babcock made a motion to quash the summons and Schwartz a countermotion for leave to amend it. The motion of Schwartz was allowed and that of Babcock denied. No appeal was taken or writ of error sued out. At the time of the beginning of that suit and of the entry of judgment therein the Practice act of 1907 was applicable. Defendants cite a number of cases arising prior to the enactment of that statute, such as Calhoun v. Webster, 3 Ill. 221; Hattan v. Stone, 4 Ill. (3 Scammon) 539; Draper v. Draper, 59 Ill. 119; Hochlander v. Hochlander, 73 Ill. 618, holding to the effect that a return on such a summons does not give jurisdiction, and that such a summons is a nullity. Defendants also cite cases arising prior to the Practice act of 1907, (Durnham v. Heaton, 28 Ill. 264; Culver v. Phelps, 130 Ill. 217) and other cases involving special proceedings as distinguished from actions at law, Rabbit v. Weber & Co., 297 Ill. 491, and Levy v. Industrial Commission, 346 Ill. 49, all holding, as it is claimed, that such a defective summons cannot be amended. We hold none of these cases is applicable or controlling. Sec. 39 of the Practice act of 1907 (see Smith-Hurd Ill. Revised Statutes, chap. 110, p. 2161) provided that at any time before final judgment amendments might be made "in any matter, either of form or substance, in any process, pleading or proceeding." We hold this statute is controlling, that the court had jurisdiction to permit amendment of the summons by substituting the true date for the date inadvertently inserted in the summons. Hamilton v. Ingraham, 121 Mass. 562; First Nat'l Bank v. Paris, 358 Ill. 378, 387. However, the validity of the judgment against Babcock is not challenged by any answer of either of the defendants. The provisions of the Civil Practice Act are applicable. Section 40 (2) provides that every

allegation except as to damages not specifically denied shall be deemed to be admitted. There is here no answer denying the validity of the judgment on which the suit is based.

III. It is next argued in behalf of the Trust company that the summons against it should have been quashed for failure to comply with section 17 of the Civil Practice Act (Ill. State Bar Stats. 1937, chap. 110, p. 2385). The record shows that the complaint in this case was filed February 26, 1934; that summons issued on that day to the sheriff of Sangamon county and was returned by the sheriff as served on Souther, agent of the defendant corporation, on February 27th. On the same day the summons issued to the sheriff of Sangamon county a duplicate summons in the same cause issued to the sheriff of Cook county. This summons was returned later by him not served on either defendant. In the return the sheriff states: "Nor can I find any officer or any agent of said corporation in my county, dated this 19th day of March, A. D.1934." August 13, 1934, another summons in the cause issued to the sheriff of Cook county which was returned as follows: "The within named defendant_____a corporation, not found in my county, nor can I find any officer or any agent of said corporation in my county, dated this 13th day of August, A. D. 1934. The within named defendant not found in my county, dated this 20th day of August, 1934. William D. Meyering, Sheriff, By Chris M. Gale, Deputy." Section 17 of the Civil Practice Act provides:

"An incorporated company may be served with process by leaving a copy thereof with any officer or agent of said company found in the county; and in case the officer or other person attempting to make service shall make return or affidavit upon such process that he cannot in his county find any such officer or agent of said company, then such company may be served in any other county of this State, in the manner provided in section 10 of this Act, or may be notified by publication and mail in like manner, and with like effect as is provided in sections 14 and 15 of this Act."

Paragraphs 1 and 2 of section 10 provide:

"(1) When a civil action is commenced in any county, summons may be served upon the defendants wherever they may be found in the State, by any person authorized to serve writs.
(2) One or more duplicate original summonses may be issued, marked 'First Duplicate', 'Second Duplicate', etc., as the case may be, whenever it will facilitate the service of summons in any one or more counties, including the county of venue."

The motion of defendant to quash the return of the sheriff of Sangamon county is not supported by any affidavit. The motion does not purport to give information necessary to a determination of the question raised. The complaint alleges defendant corporation is organized under the laws of New York. The motion does not state whether it is so organized, whether it is a foreign or domestic corporation, or whether, if foreign, it is licensed or unlicensed in this State. The motion admits that the venue was properly placed in Cook county. It does not state whether the Trust company is doing business in the State or, if so, where its principal office is located. It does not state whether it is doing business in Cook county nor whether any agent or officer of it can be found or could have been found and served in Cook county. The Business Corporation Act (Ill. State Bar Stats., 1937, chap. 32, par. 11; Smith-Hurd Ill. Stats., chap. 32, par. 157-111) provides for service upon the registered agent of a foreign corporation and upon the Secretary of State where no registered agent has been appointed. (Ill. State Bar Stats., chap. 32, par. 103; Smith-Hurd Ill. Stats., chap. 32, par. 157-103.) A motion of this kind is in the nature of a plea in abatement and should be definite and certain, and in the absence of a supporting affidavit, duly verified. In view of the indefiniteness of the motion and in view of two returns by the sheriff of Cook county showing that defendant could not be found or served in that county, we think the court did not err in denying the motion to quash the return of the sheriff of Sangamon county.

IV. The final contention of both defendants is that the

complaint as amended is defective and insufficient. That question is raised by motions in behalf of each of them to dismiss the complaint. These motions point out that the complaint violates Sec. 21 of the Practice act but fail to specify in what respect, and in the bill as amended we find no cause for criticism on this ground. They assert that the judgment at law was void for want of jurisdiction, a contention which we have held without merit. They assert it affirmatively appears from the complaint that defendant has not exhausted his legal remedies for the reason (as they say) it appears the execution on the original judgment in favor of Schwartz and against Babcock was issued March 30, 1933, and was returned on May 19, 1933, by the sheriff of Cook county upon plaintiff by his attorney, giving to the sheriff an undertaking, waiving any damages that might accrue by reason of the return of the execution prior to the expiration of 90 days from the date it was issued. The complaint alleged the issue of execution to the sheriff and his return of the same unsatisfied, and this fact is not denied by answer. The bill has been taken as confessed. We hold the return of the sheriff on the execution was sufficient to justify proceedings under Sec. 49 of the Chancery act, but at any rate defendant cannot be heard to argue the contrary in view of the fact that the bill was taken as confessed.

Finally defendants contend that the complaint as amended fails to state a cause of action. They assert that the bill as amended is defective as a bill of discovery (a matter not raised by either motion); that the allegations of the complaint as amended are insufficient to justify setting aside any trust instrument, a point likewise not specifically raised by any motion. The documents attached to the bill and admitted in evidence show substantially an attempt on the part of Babcock to create in the hands of defendant Trust company a spendthrift trust in favor of

himself in money securities of the value of about ~~$200,000~~ $500,000. The evidence shows property of Babcock in possession of the Trust company from which an annual income of $28,000 is derived. The court properly held that the money and property of the judgment debtor in the possession of the Trust company should be applied to the satisfaction of plaintiff's judgment. Similar relief has been given in similar cases. (Crane for use v. Ill. Merchants Tr. Co., 238 Ill. App. 257; Newman v. VanDyne, 42 N. J. Eq. 485; Ward v. Marie, 73 N. J. Eq. 510; Young v. Herman, 66 N. Y. 374.)

Under subsection 3 of section 64 of the Civil Practice act the party in whose favor a decree in equity is rendered is relieved from the burden of preserving evidence necessary to support the decree either by certificate or finding of fact. The same presumptions now favor a decree in equity as a judgment at law.

We find no reversible error in this record and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

39850

HELEN WITTON,
Appellee,

vs.

EDWIN J. NELSON,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

294 I.A. 612[4]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On December 20, 1935, plaintiff, Helen Witton, filed her complaint against defendant, Edwin J. Nelson, demanding damages in the sum of $100,000 for breach of his promise to marry her. The original declaration was in eight counts. In the first count the date of the alleged promise is said to have been on June 10, 1931, with breaches of the promise on March 1, 1932, June 28, 1932, and September 30, 1932. The complaint alleged the birth to plaintiff of a male child on September 30, 1932, of which defendant was the father.

Defendant answered, denying that he promised to marry plaintiff and denying that plaintiff had at any time requested him to marry her. He admitted, however, the existence of illicit relations with plaintiff but avers that the same were voluntary on her part and not induced by any promise to marry her. The cause was tried by a jury which returned a verdict for plaintiff to the amount of $17,500, on which the court, overruling motions for a new trial and in arrest, entered judgment.

It is contended for reversal that the verdict was contrary to the manifest weight of the evidence, and that the court should have granted a new trial for that reason; that the court erred in admitting incompetent evidence; that the amount of the verdict was grossly excessive, evincing passion and prejudice on the part of the jury, and that the court erred i the giving of instructions requested by plaintiff.

SOCIAL SECURITY

The evidence shows that plaintiff was 38, defendant 44 years of age. Plaintiff was born and educated in England, came to America in 1924 and was never married. In this country she held positions as social secretary in a number of prominent American families. At the time of this affair with defendant she held a position of that kind with a prominent family in Chicago, for which she received $50 a week. Defendant at this time was engaged in the real estate business conducted jointly with Arthur Olson, their office being located at 1745 West 91st street. Their business relationship was discontinued in a final settlement made in February, 1932. Mr. Olson and Mr. Nelson were friends from boyhood. The direct evidence in the case for the most part consists of testimony given by plaintiff, defendant and Mr. Olson.

Plaintiff no longer holds her position with the family by which she was employed. Defendant complains that over his objection the court permitted plaintiff to testify that she obtained a position after the birth of her child which she retained for only six weeks, and that thereafter up to the time of the trial she had not been employed. Also that plaintiff was allowed over objection to testify that since March, 1933, she had been receiving a disability benefit from the New York Life Insurance Company of $70 a month, and that this was her sole income, while prior to March 1, 1932, she received from her employment $50 a week and maintenance. Defendant says this evidence was incompetent (since there was no allegation of special damage in the complaint) and was highly prejudicial, leading the jury to believe that because of the alleged seduction and subsequent birth of the child plaintiff was physically incapacitated from following any vocation or obtaining employment. It is said these damages were speculative and conjectural. We are not impressed with this contention. A case for breach of promise to marry differs much in its nature from other causes of

action. From the nature of the case evidence of the social and pecuniary conditions of the parties is admissible since it is with respect to these matters that the injured party is wronged. In Jones Commentaries on Evidence, 2nd ed., vol. 2, sec. 677, p.1261, the author says of this class of cases that the evidence of the wealth and social standing of the defendant is admissible, and that:

"It seems to follow that if the social and financial condition of the defendant is proper to be shown as affecting the loss to the plaintiff, her own social and financial condition may be shown for the same reason."

In Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936, the court said:

"When the suit is for the loss of a marriage and of an expected home, the fact that the plaintiff is without the means to provide an independent home for herself is not entirely unimportant. It may be supposed to be one of the facts which both parties had in mind in making their arrangements; and it is not improper that the jury should know of it also and take it into account in making up their verdict."

This seems to express the general rule (see R.C.L., vol. 4, p. 174, sec. 32) which is also sustained by the Illinois cases, Tubbs v. Van Kleek, 12 Ill. 446; Jacoby v. Stark, 205 Ill. 34; Sulzer v. Yott, 57 Ill. 164; Douglas v. Gausman, 68 Ill. 170. There was no error in admitting this evidence.

It is further contended that the court erred in giving to the jury instructions Nos. 6 and 7 which defendant says are erroneous because they tell the jury that it may infer [illegible] the existence of a promise of marriage from the facts and circumstances of the case. Defendant says that a promise of marriage must be proved by clear and sufficient evidence, that its existence cannot be safely inferred from the fact that the parties were frequently together nor from the understanding of friends and relatives, and cites Walmsley v. Robinson, 63 Ill. 41. Defendant also says that the error was quite material in this case because the complaint declared upon an express rather than an implied promise and to this point de-

fendant cites Ballard v. Shea, 121 Ill. App. 135. The instructions are not, we think, subject to this criticism. In a case like this the conduct of the parties toward each other may be shown for the purpose of indicating whether, as a matter of fact, the promise to marry was made. Plaintiff did not bring her case upon any theory of an implied promise. On the contrary she testified that the promise was express. This was denied by defendant, but conduct indicating that there was in fact an engagement to be married was admissible as tending to corroborate her testimony of the express promise. The case of Ballard v. Shea has no application in a case of this kind. It involved a contract for the purchase of real estate and the court held that there could be no implied contract where an express contract existed.

Defendant also contends there was error in the giving of instruction No. 20, by which the jury was told that if it found for the plaintiff and if it should further find from the evidence that the defendant, while the plaintiff still confided in his promise, seduced the plaintiff and as a result thereof a child was born of which defendant was aware and had notice, the jury should take such facts into consideration, together with all of the other evidence in the case, in assessing plaintiff's damages. It is urged that this instruction is inherently vicious in that it assumes to determine the existence of a material and controverted fact, viz., that plaintiff relied upon a marriage promise as an inducement to the permission of intimacies, and that it is further objectionable in that it gives an intimation of the court's opinion to the effect that plaintiff submitted to sexual intercourse with defendant under a promise of marriage which was a material fact in dispute. The fact of intercourse and the birth of plaintiff's child were uncontradicted facts in the case. The instruction did not direct a verdict

It did not assume reliance on a marriage promise as an inducement to permit intercourse. Other instructions show that the jury was informed that the fact the trial Judge had given any instructions on the subject of damages should not be taken as any intimation that plaintiff should or should not recover. The rule applicable is stated in Nelson v. Hutton, 232 Ill. App. 93:

"In a civil action for breach of promise, proof may be offered showing seduction. This is for the purpose of aggravating the damages. Tubbs v. Van Kleek, 12 Ill. 446; Fidler v. McKinley, 21 Ill. 308; Lowden v. Morrison, 30 Ill. App. 495; Chrmong v. Henderson, 112 Mo. 383, 93 Atl. 324; 8 Cyc. 1021; 4 Amer. & Eng. Ency. of Law, 898. This is the rule in Illinois even where the seduction is not alleged in the declaration. Poehlmann v. Kertz, 204 Ill. 418."

We think there was no error in this instruction.

Defendant also contends that the giving of instruction No. 22 was error. This instruction was to the effect that if the jury should find for plaintiff the jury would have the right to punish defendant for violating his promise to marry plaintiff by awarding exemplary or punitive damages, in addition to actual damages, if the jury believed from the evidence that exemplary and punitive damages should be awarded. Such damages, said the instruction, were allowable and permissible only if the jury should find from the evidence that there had been some element of deceit, malice, oppression or evil motives in connection with the making of the promise by defendant or his breach thereof. Defendant complains that the instruction did not tell the jury what facts would or would not constitute the fraud, deceit or malice which would authorize the awarding of punitive damages, but left the jury free scope to award punitive damages according to their individual notions of right and wrong, unguided and unrestrained by any legal rule for the award of such damages. On this point defendant cites McQuillan v. Evans, 353 Ill. 239-246. Again it is to be noted that the instruction was not one which directed a verdict. A somewhat similar instruction given

in Jacoby v. Mark, 205 Ill. 34, was held not subject to criticism in view of the fact that any defect in it was cured by other instructions. This instruction No. 22 was supplemented by No. 23, which immediately follows it in the record and considering the two instructions together, we think it must be held the law applicable was stated.

We have given consideration to points with reference to instructions notwithstanding the fact that the record in this case is defective in that it fails to disclose at whose request the instructions were given. It has been held in many cases that such a defect in the record precludes the consideration of the instructions upon review. Shively v. McKinney, 84 Ill. App. 406; Distilling Co. v. Peoria, etc., R. R. Co., 136 Ill. App. 479; Hotchkiss v. Vandervoel, 139 Ill. App. 325; McKay v. Prindle, 131 Ill. App. 566; MacNeal v. Kissendrath, 195 Ill. App. 20; Strobl v. Ingles, 245 Ill. App. 607; Price v. Bailey, 265 Ill. App. 358.

There remain for consideration the controlling questions in this case raised by defendant's contentions that the verdict of the jury is clearly and manifestly against the weight of the evidence; that a new trial should have been given for that reason, and that the amount of the damages allowed by the jury is so excessive as to indicate passion and prejudice which would compel a reversal. These contentions require a careful consideration of all the evidence in the case.

The direct evidence on the question of whether an actual promise to marry was made is by plaintiff and defendant, the one affirming and the other denying the existence of the promise. The jury has returned a verdict in favor of plaintiff, and the trial court, who heard the witnesses, has approved of the verdict of the jury. The question for this court is whether under all the evidence we can find that the verdict is manifestly against the evidence. In

such a state of the record every circumstance becomes important in determining the weight to be given to the testimony of each party. Plaintiff and defendant both testified at length in their own behalf. Arthur Olson, defendant's former partner but now (as defendant says) only on speaking terms with him, testified in detail as to corroborative facts. These three witnesses and the letters of plaintiff to defendant, which were offered in evidence by defendant himself, furnish the material from which this controlling question of fact must be determined.

The testimony shows that plaintiff first met defendant about the end of January, 1931, at a girls' club at 75 East Elm street, which she was then conducting; that defendant was brought to the club by his partner, Arthur Olson. Mrs. McKennie, a nurse, and friend of plaintiff, who was visiting her at that time and who died about two years before the trial, was present.

The evidence of the three is to the effect that the visits of defendant and Olson to the club were thereafter frequent. Plaintiff says that defendant came to the house with Mr. Olson on an average of about three times a week from the end of January. Sometimes they went driving; sometimes to the theatre; sometimes to a cafe, the four together. Sometime thereafter, plaintiff says, defendant called her at home and asked her if she would like to go to the theatre with him and she said she would, and he inquired, "Do we have to have Tillie and Arthur along? I want to take you by myself; I don't want to share you all over town." She told him, "That would be great fun." He came there on that evening and they went together to the Chicago theatre and then to a cafe where they had supper; no one else was with them. After that plaintiff says she went out with him frequently, either saw him or he called her every week day. She says that in the month of June, 1931, he invited her to dinner at Irelands, on the near North side; she accepted

the invitation. In the meantime the family with whom she made her home had moved to Lake Bluff. Defendant met her there on two occasions; she says that while at Irelands he asked her if she had a great many friends; she said "yes," and that he had also;"he said, 'I have only one friend, Arthur Olsen.' I said, 'You have me' and he said, 'I want you for more than a friend'; he said, 'Do you think you could stand it, to look at me across the table for the rest of your life?' I said I would have to think it over." She next saw him the Sunday following when he drove to Lake Bluff to bring her to Chicago; this was about June 15th; he asked her if she had thought of what he asked her at Irelands; she told him she had thought of nothing else; he asked her not to turn him down as she was all he had in the world, and she told him she wasn't going to; she says he asked her to marry him after Christmas; said he would have his affairs in shape by the end of the year; she told him she didn't know the world held so much happiness and told him "yes." She says he then asked her if her family would want a formal announcement; he thought being English they would; she replied that when she was in Rome she did as the Romans do.

A recitation of all the evidence would become wearisome and unduly extend this opinion. It is sufficient to say that Nelson denies in toto every conversation with plaintiff indicating a proposal of marriage on his part or acceptance by her. The uncontradicted evidence, however, shows that thereafter up to December 20, 1931, he was constant in his attentions to her and when the family by whom she was employed moved to Lake Bluff he went there to visit her. The evidence also shows that in the latter part of August she received an invitation to visit friends in Louisville, Ky.; that she talked with defendant about it, and it was finally agreed that defendant would drive the automobile furnished by her employer for her use, and they would make the trip together. Her testimony is

to the effect that on the first evening out they stopped at a hotel where he (without her knowledge) registered them as husband and wife, and notwithstanding her protests insisted on occupying the same room with her that evening, to which she finally assented. He does not deny that they did occupy the same room but denies other incidents as related by her. His testimony is to the effect that their undue intimacy began not at that time but on the evening prior thereto when they occupied a room at Olson's flat in the absence of Olson. It is undisputed he was presented by her to her friends in Louisville and that they returned together. His testimony is to the effect that on the way back at a town and in a hotel the names of which he cannot remember, they again occupied the same room. The evidence is to the effect that his attentions continued until December 20, and that on the evening of that day they occupied a room together at his flat. His evidence also is to the effect that on December 22, (two days later) he resumed his courtship of the lady he has since married, in fact that he became engaged to her on that date. Thereafter a marked degree of coolness developed between him and the plaintiff.

Sometime in March plaintiff called him up and requested an interview and at that time told him of her pregnancy. He says he was "flabbergasted." He at once assumed responsibility, employed a physician, provided funds to give her another trip to Kentucky; through the physician arranged that she should be cared for at a hospital where the child (a boy) was born on September 30, 1932. The physician became interested in the case and on October 15th the records of the County Court show this child was with the consent of the mother adopted by a wealthy family.

From June 13, 1931, and thereafter plaintiff wrote to defendant 12 letters which were offered in evidence by him. All of this, of course, only indirectly bears upon the controlling question

in the case which is whether the defendant promised to marry the plaintiff. Defendant says that on this point the case rests entirely on plaintiff's testimony alone, which is so improbable and contradictory that in view of his denial, it must be held that the verdict in her favor is manifestly against the evidence. We have given careful consideration to the evidence in the record bearing on that issue. It is true that the direct evidence as to the promise to marry rested on plaintiff's testimony alone and the conversations between plaintiff and defendant, all of which he denies, but we cannot accept defendant's contention that the testimony of plaintiff is improbable in view of the uncontradicted facts and corroborative testimony appearing in this record. It is uncontradicted that from the time defendant met plaintiff in February, 1931, until December 20 of the same year, he was attentive to plaintiff in a way which indicated he was very much interested in her. Olson, his friend and companion, testifies (although defendant denies) that defendant so expressly stated to him. Defendant's own testimony is to the effect that during this time the courtship of the lady to whom he is now married was interrupted, and that the resumption of that courtship occurred almost simultaneously with the cooling of his affection for plaintiff. These circumstances tend very much to corroborate plaintiff's testimony of defendant's promise. More than these is the undisputed evidence that defendant introduced plaintiff to the members of his own immediate family, presented to her the key which had been awarded him by his college for merit in debate, that he even took an interest in the clothes plaintiff purchased. These facts tend to make the ultimate question here one for the jury. We shall not stop to discuss the contradictions in their testimony, for instance, her statement that their illicit relations began at an unnamed hotel on the automobile trip to Louisville, as against his that they began at the Olson flat on the night before

they started on the trip. After all, it is not denied that he made the trip, that these things occurred on the trip, and that he was presented to her friends in Louisville in a manner tending to indicate to them that he was a close friend of plaintiff. Also corroborative is the fact that when she became aware of her condition she called that fact to his attention; that he without protest accepted the responsibility for her condition; that he provided her with money for a journey to friends outside the state, provided her with a physician and a nurse, paid her expenses incurred while the child was being born in the hospital. Olson says that during that time defendant asked his help in the matter, and that he advised that defendant marry plaintiff as he had agreed to do. The testimony of defendant's own witness, Robson, does not help defendant's cause. Robson, an attorney, testifies that in the latter part of July, 1932, in company with defendant and Olson, he went to a law office in Chicago; that on the way over "Ed Nelson asked Art Olson if he had been able to come to some settlement with Helen, I didn't know who she was, and he said no, she had been out of town. After we left this conference, we came down stairs, Ed Nelson said, 'My God, Art, you ought to be able to do something here to help me out' and Art said to him, 'Well, Ed, it is a devil of a position to be in.' He said, 'I feel accountable to both of the parties in that I introduced you to Helen and then this has to come up.' He said, 'The best way out of it that I can see and to save you the least embarrassment would be to marry her,' and Ed said to Art,he said, 'Well, Art, I never loved her. She knows that I don't love her.' He said, 'I don't want to marry her. I am willing to pay her expenses and do everything that a person should do under the circumstances, but I can't marry her, you know I don't love her,' and Art Olson said to him, 'Well, I know you don't.' He said, 'Ed, I know the reason you two have been going around together, but I think

it would be the easiest way out for you.' And Ed said, 'Well, try to do something, will you, Art?' and Art said, 'Well, I will have to wait until she gets back in town.'" There was no cross examination.

Manifestly in view of plaintiff's testimony, corroborated as it is by that of Olson and many undisputed facts in the case, the reviewing court (which has not seen or heard the witnesses) cannot say that the verdict is against the manifest weight of the evidence.

Defendant, however, contends most strenuously that these twelve letters written by plaintiff, when carefully read negative entirely the thought that there was any promise on defendant's part to marry plaintiff at any time. This inference is drawn from the fact that in these letters in which at times she describes her terrible experience in view of her delicate condition, she does not at any time suggest to defendant that he had broken any promise to marry her. Defendant practically rests his case upon this contention and cites Roe v. Doe, 57 Hun. 594---11 N.Y.Suppl. 236, as a case where under circumstances which he insists are similar the Supreme court of New York held that the letters of the plaintiff were such as to negative a promise to marry. We have read that case and other cases cited by defendant and regard them as clearly distinguishable. In the Roe case the letters of the plaintiff disclosed her to be a person of impure character and somewhat brazen in asserting it. There is nothing of that kind in this case. In fact the uncontradicted evidence shows that defendant had been attentive to plaintiff for many months, during which time there was no improper conduct or indication of such conduct on her part. The evidence taken as a whole indicates a sensitive and cultured woman who was possessed of a good deal of social pride. She apparently, in the face of his coolness, was not disposed to throw in his face the

it would be the modest and not far off. 'Well,
But to be honest, still then, really not far off. 'Well, I will
have to wait until the time have to know.'' Those are my remarks
conclusion.

fact of his promise to marry her nor make her plea to him entirely upon that ground. She knew something of the art of writing letters. She had some reason to hope for a future useful life. She would naturally be cautious in writing any letter to defendant that would disclose in the future that she had relied upon his promise to marry her. After all, it was a question for the jury and the trial Judge. With them rests the responsibility. The complaint that the damages are excessive is more plausible. The evidence does not show that defendant is a man of great wealth. It does not indicate that he has been fortunate in his business ventures, or that he has a large income. However, the wrong to plaintiff is grievous. Here again, the question was for the jury. The trial Judge has approved.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., concurs.

McSurely, J., dissents: The amount of the verdict is grossly excessive, indicating passion and prejudice on the part of the jury.

39850

HELEN WITTON,
Appellee,

vs.

EDWARD J. NELSON,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

ADDITIONAL OPINION OF THE COURT UPON PETITION FOR REHEARING.

After giving consideration to the points made in the petition the court adheres to its views that there were no procedural errors requiring the reversal of the judgment. Moreover, we think a submission of the issues to another jury would result in another verdict for the plaintiff. However, the petition prays in the alternative that a remittitur for a substantial sum may be required. The court is of the opinion that the verdict is excessive, and upon reconsideration we are of the opinion that it is so excessive as to require a remittitur. The order, therefore, will be that the judgment will be affirmed upon the plaintiff filing in this court within 10 days a remittitur in the sum of $5000, whereupon the judgment will be affirmed; that in default of the filing of such remittitur within that time the judgment will be reversed and the cause remanded for another trial.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

39861

THOMAS G. NICHOLS,
Appellant,

vs.

THE FOUNDATION DESK CO., INC., a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

294 I.A. 613

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Foundation Desk Co., Inc., is a publisher of books in Chicago. The plaintiff, Thomas G. Nichols, is a broker or distributor of books at Kansas City, Mo., and in adjacent territory. On January 14, 1925, the parties entered into a written contract whereby defendant corporation agreed "to sell to the party of the Second Part the Foundation Library, consisting of three volumes as follows: The Child's Treasury, The Home Educator, and The Juvenile Artist, at a price which shall be found by adding a royalty of $2.00 per set to the cost price of such Foundation Library, to be shipped F.O.B. Chicago, in boxes or cartons; cost of such boxes or cartons to be included in the manufacturing cost."

On December 7, 1926, the parties entered into another written contract in which, while changing other terms, the corporation made a precisely similar promise as to the price at which it would sell to plaintiff this "Foundation" Library. This last named contract was to go into effect on the first day of January, 1927, and continue in full force and effect for a period of four years with the understanding that renewal thereof was to come up for consideration 6 months before the expiration of the same. Before the expiration of the contract, and on December 30, 1929, the parties entered into another written contract wherein it was recited that they were desirous of terminating the relationship, mutual rights, obligations, etc., created by the contract of December 7, 1926, and to cancel

Boston U. School,
Administ.

74.

The Foundation Year Co., Inc.,
Corporation,
Upsala.

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it; that each had rights which they were willing to forego for the purpose of amicably settling and stating the account between them; that it was therefore stipulated and agreed that said contract of December 7 should be canceled and terminated as of that date, and that in consideration thereof and in settlement of the obligation of Nichols, party of the first part "will pay on this date his November bill amounting to Six Hundred Eighteen Dollars and Sixty-six cents," will give his note to be paid January 15, 1930, for the December, 1929, bill and will pay his note due January 15, 1930, for $1960.27 on February 15, 1930. Also:

"Party of the second part further agrees that by virtue of these presents, and in consideration of first party waiving any claims against second party except as hereinabove specified (which second party agrees to satisfy in the manner above provided), to waive any and all claims which he may have against first party of any nature whatsoever, and hereby releases second party therefrom."

This agreement also provides that in consideration of the settlement the defendant corporation agrees to sell to Nichols sufficient books to take care of his orders until February 15, 1930.

December 20, 1930, Nichols filed in the Superior court his bill to which he made the Desk company defendant, in which in substance he charged that under the contracts of January 14, 1925, and December 7, 1926, defendant overcharged him for the books furnished; that defendant had represented to him that the cost of the books was $2.72 a set for books billed to him at $4.72 a set, and during other portions of the time that the cost was $2.52 for books billed to complainant at $4.52 a set, while as a matter of fact the books at no time cost defendant in excess of $2.08 a set and during a great part of the period the cost was not to exceed $1.75 a set. The complaint averred plaintiff did not learn that this was the fact until after December 30, 1929; that prior to his execution of the release of the contract of December 30, 1929, it was represented to him by the agent of defendant that the amount plaintiff had been charged for the books was the actual cost thereof plus $2.00 a set

as set forth in the contracts; that plaintiff had no means of ascertaining whether the statement was true or not and executed the contract and release of December 30, 1929, in reliance upon these statements; that he had demanded an accounting and refund of the excess charges which defendant had denied, insisting that the contract of December 30, 1929, was a release from any liability to make such accounting. The complaint avers that this release was obtained by fraud and misrepresentations and was therefore void and should be cancelled, and that an accounting might be taken. Defendant answered, denying the claims of excess charges, fraud, etc. The cause was referred to a master who took the evidence and filed his report, finding in substance that there was no proof of fraud or misrepresentation and that the contract and release of December 30, 1929, was obtained fairly; that no fraud or misrepresentation had been proved and no reason for an accounting shown and recommending the complaint be dismissed for want of equity. Objections were filed to the master's report which being overruled on the hearing stood as exceptions. The Chancellor overruled the exceptions and on July 8, 1937, entered a decree dismissing the bill.

It is contended by plaintiff as a matter of law that the contract must be construed according to the ordinary meaning of the terms employed; that the contract will be construed most strictly against the party drawing it, and that when the party drawing a contract knows that the other party understands it in a certain sense, it is to be taken in that sense provided this can be done without making a new contract. It is urged that there was in fact fraud in defendant's failure to disclose the true price it paid for its books, and that as a matter of law plaintiff's knowledge of the falsity of any part of defendant's representations will not excuse defendant from responsibility for the remainder of such representations. The master found the facts to be that the plates for the

books delivered by defendant to plaintiff were originally manufactured in 1923 by the Quarrie Corporation, Ltd.; that from the time the books were marketed by defendant to April 1, 1924, defendant paid the Quarrie Corp., Ltd., 47½¢ a set for the use of the plates and dies as a basis of cost and depreciation to the owner of the plates; that when Nichols began selling the books the price made to him at the beginning and while the plates were owned by the Quarrie Corp., Ltd., was $4.72 a set; that this price was made up by taking the manufacturing cost of $2.24½, a royalty of $2.00 and the charge for depreciation of the plates and dies of 47½¢; that this continued until about January 1, 1928, at which time defendant notified plaintiff that he was having the books printed in Columbia, Mo., and that thereafter the charge to plaintiff would be $4.42 a set; that on account of the fact that the carrying charges from Columbia, Mo., to the territory in which complainant operated would be less than he formerly asked plaintiff to pay an additional charge of 10¢ over $4.42 or a price of $4.52 a set; that this arrangement was agreed to verbally between plaintiff Nichols and William F. Quarrie, who visited Kansas City about January 1, 1928; that thereafter all the books were billed to complainant at the price of $4.52 a set; that in the later part of 1929 the correspondence between the parties shows that disputes had arisen between them. In 1927 Mr. Nichols organized the T. G. Nichols Company with headquarters in Kansas City. In the years 1928 and 1929 this company was engaged in preparing to bring out a new set of four books of such a nature that they would compete with the books of defendant. In the correspondence of the later part of 1929 plaintiff for the first time charged that defendant was not treating him fairly, in that it was overcharging him by making him pay the 10¢ a set which had been agreed upon in January, 1928. Nichols also charged that the Foundation Library was not being kept up to date; that because of this orders from customers had been

canceled and many books returned. On the other hand defendant complained of the preparation of this new set of books by the Nichols company, called plaintiff's attention to the provisions of his contract requiring him to give his entire attention to the business of defendant. Plaintiff finally refused to send his check for the amount of the November sales coming due on December 15, 1929.

December 30, 1929, Mr. Lamberson, vice-president of the defendant company, went to Kansas City, called at the office of complainant and after a discussion of matters pro and con for some time plaintiff said to Lamberson, "Well, if you want to cancel this contract, why I will call my secretary in and you may dictate to her and we will see how it looks." The secretary was called in and Nichols dictated the proposed cancellation. Lamberson said he wished to look it over and took it away with him. About 3 o'clock the same afternoon Lamberson returned with a contract which he proposed should be executed, and after a short conversation it was signed by plaintiff and by Lamberson for defendant. Pursuant to that contract plaintiff gave a check to Lamberson for the November bill amounting to $618.66, delivered to him his note due January 15th following, payable to defendant for the amount of the December bill and gave his note amounting to $1960.27 due February 15, 1930, for the January bill. The next day Nichols wrote Quarrie, saying:

"Mr. Lambertson and I had a very nice visit yesterday and we adjusted our differences to my satisfaction. I have never had a lawsuit in my life and I feel I am just a little too old now to participate in one unless it is absolutely essential to my self-preservation. I am not of the fighting nature. I like peace and harmony."

He goes on to say that Lamberson was one of the finest men he had ever dealt with; that it had never been his intention to beat Quarrie out of a penny; that he heard 5 months before that Quarrie was charging him 50¢ a set more than his contract called for; that

he had heard this from two sources. He closed by wishing Mr. Quarrie good health and lots of happiness.

January 6, 1930, defendant replied in part saying:

"The information that you say came to you from two sources that we were charging you 50¢ per set more than your contract called for is absolutely incorrect. May I suggest, Mr. Nichols, that you, I think, because of the environment in which you were raised have always been an unusually suspicious fellow---much too inclined to credit rumors that came to you that were manufactured for a definite purpose."

Janumry 9 Mr. Nichols replied, saying he enjoyed the letter and continued:

"But, Mr. Quarrie, I can never forgive you in a way for overcharging me for these books. I consider it pure thievery----stealing if you please. I am surprised that a business man who claims to be honest and honorable would do such a thing. I have known this for the past five months and I don't want you to feel I signed [illegible] releasing contract before I knew this. But I just figure it this way, that the money you fraudulently secured from me will hurt you worse than it will me. I won't have to lose any sleep over it and you will.

My environment has been a damned sight better than yours because I was brought up in a Christian home."

February 15 Nichols wrote again, saying that on that morning he was getting ready to send a check as per contract when the Express people called him up and stated that Quarrie had sent him 100 books C. O. D. for four hundred and some odd dollars. He said that was not the contract, and that he would not send a penny on the note or the last month's bill until these books were released; he added:

"To tell you the truth I would just as soon not pay this bill because I have grounds for a mighty fine law suit against you and if you want to throw the whole thing open just say the word and we will do it."

Shortly thereafter, however, Nichols sent a check to the defendant in full payment of the note for $1960.27.

The briefs of the parties argue at great length and with many citations of authority their variant construction of the words "cost price" as the same appear in the contracts. Plaintiff contends that under no circumstances could it include the charge made for depreciation of the plates. It appears, however, from the evidence that this charge was being made and was a part of the cost of manufacture at

the time of the first contract between plaintiff and defendant was executed. Plaintiff says it was the duty of defendant to disclose to him all the different items making up what defendant claimed to be the "cost price" of these books, and that is undoubtedly true as all the evidence to that effect was in the possession of defendant, It is significant, however, that never until a few months before the termination of their relationship and not until differences had arisen concerning other matters was this subject even mentioned. Plaintiff was entitled to receive this statement as to the items going into the "cost price" if he asked for it, but he did not do so at any time. The inference is that he was entirely satisfied with the price at which the books were billed to him. He resold the books at from $19.75 to $21.75 a set.

The controlling question of fact in the case arises out of plaintiff's contention that Lamberson, as an inducement to the execution of the contract and release of December 30, 1929, assured Nichols that defendant had not at any time overcharged him for the books furnished, and that Nichols executed the release relying upon that assurance. Nichols says that in the presence of Miss Batchelar Lamberson said he was there to cancel the contract of plaintiff and defendant, to which he, Nichols, replied he "was not interested in cancelling the contract and said that he wanted to 'find out definitely whether Mr. Quarrie was actually charged me for these books what they cost. I want to know if he overcharged me'; that Lamberson said, 'I can definitely state that you have not been overcharged for these books. I have seen the bills and I know positively that you have got the books at $2 above the printed cost of them.'" Lamberson denies, and says that at that time he told Nichols that he was probably aware of the reason for his coming there; that plaintiff had a contract with the Foundation Desk Company which had another year to run, during which time he had agreed to give his undivided time and

attention to it, and that he had already broken that contract by bringing out his new set of books; that he owed defendant money and he (Lamberson) had come down to get the matter settled. Lamberson says Nichols replied he "had built up his new set of books as the result of necessity; that the Foundation Library was out of date and would not sell and he would not be able to continue his sales organization; that the books he had sold were not satisfactory and as a result he had been compelled to build a new set of books. He told me Quarrie had 'gypped' him, - overcharged him; he had paid him thousands of dollars he should not have charged him." Lamberson says he told Nichols he had known Quarrie for five years and had never heard even the slightest suggestion or indication of anything other than a square deal; that Nichols said in spite of that fact he had been 'gypped' but he did not want a lawsuit and wanted to know what Lamberson had in mind in regard to the cancellation of the contract. Miss Batchelar testified but does not on this point corroborate Nicholas. The letters of Nichols are quite inconsistent with his testimony on this issue. The finding of the master, "that plaintiff is in no position to claim lack of information at the time he signed cancellation contract of December 30, 1929, and I therefore find no fraud or misrepresentation proven and no reason for accounting is shown," seems to be entirely justified. A late authority is to the effect that a court of review will not be justified in disturbing such a finding of the master when approved, as here, by the chancellor, unless it is manifestly against the weight of the evidence. Pasedach v. Auw, 364 Ill. 491.

The decree is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

39874

LOUISE THOMPSON,
Appellee,

vs.

VERNON THOMPSON,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

514

294 I.A. 613[2]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

February 23, 1937, Mrs. Thompson filed her complaint against her husband, Vernon Thompson, setting up jurisdictional facts as to residence, alleging the marriage of the parties on October 10, 1935, their cohabitation until January 25, 1936, on which date she averred that he without cause deserted and abandoned her and persisted in such desertion for one year. She prayed for a divorce and for an injunction restraining defendant from molesting her.

He answered, admitting other averments of the bill but denying willful abandonment or desertion orpersistence therein, but alleged on the contrary that plaintiff had without reasonable cause deserted and abandoned him.

The evidence was heard by the chancellor who found for plaintiff and on July 15, 1937, signed a decree in her favor. Defendant appeals.

It is argued for reversal that the evidence shows the alleged desertion was not against the will and wishes of plaintiff, but particularly that defendant within one year after they lived together had offered to return to her, but that she refused his offers of reconciliation. The evidence can hardly be said to be conflicting. It shows that Mrs. Thompson lives at 6611 Kimbark avenue, with her mother and sister. The evidence also tends to show that defendant was not able to earn a livelihood for himself and wife; that he borrowed money from their mutual friends and that about two

months before their separation, by agreement, they went to live at the home of her mother. On this particular occasion he lost the job at which he had been working, and she says that on this Saturday morning she asked him to get up and told him he should go out and look for work; that he replied that he wanted to lie around for a few days, that there was no particular rush about getting a job. She told him that they could not live there and owe people the way they did and live on her mother; whereupon he got up, said he did not have to live there on her mother; he asked her sister, Mrs. Lenz, to call a cab which she did and he left, taking his clothes. The parties have been living separate and apart from that time. No children have been born of the marriage. Defendant says they went to live with her mother at the suggestion of plaintiff, that her mother had plenty of room, and she would not be alone at night. He says, "Her family treated me very fine." He also says that about a week prior to January 25, 1936, he had a quarrel with his wife, who at that time supposed she was pregnant and suggested an abortion, which he tried to talk her out of; that their trouble started with that and continued until he left; that he suggested he would leave if she went through with this. This evidence is denied by plaintiff. Defendant does not, however, deny the testimony of plaintiff and her sister to the effect that he voluntarily took his clothing and departed at the time in question and has not lived with her since.

Defendant contends that the decree of divorce is against the manifest weight of the evidence. The chancellor heard the witnesses and at the conclusion of the evidence gave a summary of it with which, after a careful consideration, we are inclined to agree. At any rate we cannot hold that the findings of the court are clearly and manifestly against the weight of the evidence. The defendant relies upon the proposition of law that when a husband who has deserted his wife makes a bona fide attempt to return and live with her within

the statutory period and he is repulsed and refused by her, the desertion terminates and that a decree of divorce entered under such circumstances is contrary to the law. Defendant cites a number of cases, among which are Silverstein v. Silverstein, 178 Ill. App. 145; Pratt v. Pratt, 197 Ill. 530; Haley v. Haley, 209 Ill. App. 153; Garvy v. Garvy, 282 Ill. App. 485, and Lyons v. Lyons, 231 Ill. App. 568, and argues that these cases hold that under circumstances such as are disclosed by the evidence here a divorce will not be granted. There is no doubt of the general proposition that where a spouse who has deserted, in good faith makes an attempt at reconciliation within the statutory period and is repulsed or refused, the effect of such action is to terminate the desertion and prevent the entry of a decree of divorce, but the attempt at reconciliation must be made in good faith and under circumstances of such character as would make the refusal wrongful. The testimony of defendant on this issue is to the effect that about two weeks after he left he called on plaintiff and they talked about the personal property and some of the things, such as the radio, that were supposed to belong to him. He does not say that he asked for a reconciliation at that time. About six weeks after the separation he saw her on the Illinois Central bridge at 67th street; she then said it was all over, wouldn't give him much satisfaction and expressed a desire to have her freedom. At that time he had no apartment to which to take her and he cannot recall exactly what he said when they met, but admits he did not tell her that he could rent an apartment or that he could take care of her. On several occasions he called over the 'phone and several times called at the house but was refused admittance. Mrs. Lenz, who answered the 'phone and looked after the door, says defendant was drunk on these occasions, used vile language and threatened to kill plaintiff. Defendant admits his wife was of a timid disposition; that she was afraid to be

alone at night in the apartment, and he had given her a gun for protection. Some time in November, 1936, he consulted a lawyer and his method of approach to his wife seems to have immediately improved. November 30 he wrote her a letter in which, among other things, he said:

"In fairness to both of us and before I can possibly let you pass out of my life I want both of us to get together and try to be congenial and happy again as we were not so many months ago."

He does not speak of any definite place to which he could take her, but says he would like to get an apartment like the one they had at Jeffrey parkway and have her with him again. There is nothing very definite in the letter; he does not give her information on which she could rely nor suggest a way in which their differences might be discussed. December 12 he sent her a telegram saying he was surprised to have his last letter returned and continues:

"Because you seem not wanting to see me which you should I will tell you beforehand what to expect I want a reconciliation have copies of all letters sent to you to be presented in court I am going to demand a jury trial and bring up everything of our married life I am going to prove that you committed a perjury and in order to back this I shall supoena old neighbors and relatives of Parduhn and I have a already thru an attorney notified all divorce judges that I intend to contest any divorce proceedings brought up by you and I shall also see to it that one of your friends who I think you left me for shall have to appear and I shall try to see to it that any gentlemen friends shall know that you are my wife. I want a reconciliation in fairness to both of us and I know how much you cared and can still care lets cut out this foolishness and get an apartment as nice as the one we had on Jeffrey and make a go of it. Your loving husband Tommy."

In a later letter of January 27, 1937, he addresses her as "Dearest Louise," saying he was much disappointed when she failed to answer his last letter but that he still cared enough for her to appeal again that she please consider his demands for a reconciliation as soon as possible. He added:

"I still love you Louise and am working steady and can provide for you well enough so that you won't have to continue working nites as a nite club hostess. I think you are much to fine for any kind of work like that and I beg of you to give me a chance to support you so that you won't have to work at all if you don't want to.

You know that I have never favored our separation and am still waiting to forgive and forget anything that you ever did or

said that hurt me.

I married you because I loved you. I still love you and insist upon another chance to support you and try to make you happy. Please answer soon.

Sincerely,

Tommy."

These letters must be read in the light of the fact that he had waited ten months or more after their separation before writing and that the letters were evidently written under advice of counsel. Read in the light of the testimony of plaintiff and Mrs. Lenz to the effect that defendant was usually drunk when he called on the 'phone or at the house, used all sorts of improper language, and also read in the light of the telegram which was apparently sent without legal advice, we do not think it could be held as a matter of law that defendant made a good faith offer of reconciliation under circumstances which would require an acceptance of his offer by plaintiff. He does not deny plaintiff's testimony to the effect that his conduct was such as to persuade her to take out a warrant and that he failed to appear at the hearing. The telegram was a threatening document which might well have led plaintiff to distrust him entirely. A man who wishes reconciliation with a wife from whom he is separated should not conduct the negotiations with a club. Defendant was questioned by the trial Judge as to the sending of the telegram and gave no justifiable explanation.

Summarizing the evidence in the case the Chancellor said:

"He admits the desertion and he offers nothing that the law considers as justifying that desertion. He has offered to take her back and live with her. That, of course, would bar a right to divorce on the grounds of desertion, provided the offer is made in good faith and provided she hasn't the right to refuse to continue to live with him. * * * * He admits he kicked in or tried to kick in the door; that he created a disturbance. No man is entitled to ask his wife to come back and live with him under threats of violence, even through a door, to put her in any kind of fear. He says the plaintiff is a very timid woman. It is apparent she would be under such circumstances. He is a man inclined to make threats; he has very clearly indicated it by the type of telegrams he sent, even with respect to notifying all justices himself that he intends to contest the divorce. He is in the custom apparently of making threats. * * * No man has a right to ask a wife to come back and live with him under

said that he.

I believe you promised I never [illegible]. I might have you not
[illegible] anyone be obliged [illegible] to make [illegible]
happy. Please answer soon.

Sincerely,

Jenny.

Three letters must be read in the light of the fact that [illegible]
had waited two months or more after [illegible] before writing
[illegible] the letters were evidently written under advice of counsel.
Read in the light of the testimony of plaintiff and [illegible]. Once is the
effect that defendant was constantly under the eye of [illegible] the 'Home
of the House', used all sorts of [illegible]. And also read
in the light of the telephone which was [illegible] that [illegible]
advice, we do not think it could be said as a matter of law that de-
fendant took a good faith effort of reconciliation under circumstances
which would require an acceptance of the offer of plaintiff. We
have not dealt plaintiff's testimony in the effort that the meeting
was such as to warrant her in [illegible] a warrant was right to [illegible]
to appear at the meeting. The testimony was a mistaken impression
which might work [illegible] plaintiff in [illegible] the meeting. I see
why minors reasonableness with a view [illegible] he is entirely [illegible]
not conduct the negotiations with a mind. [illegible] the [illegible] by
the other party in the exercise of the relations and [illegible]
able equivocation.

Summarizing the evidence in the case the Commissioner said:

"We admit the Examiner may be wrong in [illegible] that the im-
pression of [illegible] that [illegible]. He has stated in [illegible]
back and [illegible] with her. That, of course, might [illegible] in it-
verse on the grounds of [illegible]. [illegible] the other is made in good
faith and [illegible] the right to [illegible] in [illegible]
live with him. [illegible] be entitled to [illegible]
the door; that he created a disturbance. He has [illegible]
his wife to come back and live with him at [illegible]. [illegible]
even though a jury, he put her in jail. [illegible]
plaintiff is a very [illegible]. If [illegible] [illegible]
ness eloquence. [illegible] [illegible]
very clearly indicated it by the type of [illegible], even with
respect to notifying all [illegible] [illegible]
the divorce. [illegible] [illegible]
[illegible] [illegible]

such a threatening attitude, and inasmuch as the desertion is admitted here and there is no cause shown for justifying that abandonment, no such offer to take her back under conditions that would justify her doing so, there is nothing left except to enter a decree for the complainant."

With this statement of the law we agree. Defendant argues that it was error to admit evidence of these alleged threats over objection. There is no merit in the contention.

The decree is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

39912

PEOPLE OF THE STATE OF ILLINOIS
ex rel. BYRON F. VERDUNG,
(Petitioner) Appellee,

vs.

ROBERT J. DUNHAM, President and Commissioner of the Chicago Park District, et al.,
(Defendants) Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

294 I.A. 613

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The relator filed his verified petition praying for an order of mandamus against the Chicago Park District to compel the payment of his salary as patrolman. Defendants filed a verified answer denying petitioner was entitled to the order. There was a trial by the court with a finding for the petitioner and judgment thereon.

There is practically no dispute as to the facts, but it is contended in behalf of defendants that as a matter of law petitioner was not entitled to the relief prayed. In another phase this matter was before this court on a former appeal. Verdung v. Bobrytzke et al., 275 Ill. App. 633, abstracted. The record shows that the Lincoln Park Commissioners, a municipal corporation, was one of the predecessors of the Chicago Park District into which several districts were consolidated May 10, 1934. Pursuant to statute the question of consolidation was submitted to the voters of the respective districts, who voted in favor of the consolidation. The consolidation was afterward held valid by the Supreme court. (Koenig v. Chicago Park District, 362 Ill. 24.) Prior to July 1, 1911, the Lincoln Park Commissioners were authorized by statute to appoint and support a police force. Pursuant to the statute relating to Civil Service the commissioners ratified and approved a classification of all offices and places of employment

39013

[illegible]

vs.

[illegible]

[illegible]

[illegible]

in the district as made and recorded by the Superintendent of Employment. The position of patrolman was one of the places so classified The relator passed the required examination and was duly appointed patrolman in 1920. He served in that position until April 17, 1933, when he was discharged. Charges were filed against him of which he was found guilty May 11, 1933. September 19, 1933, by petition for certiorari relator caused the record to be removed to the Superior court of Cook county. December 28, 1933, that court quashed the record finding relator guilty. The Park District appealed to this court. In an opinion filed June 11, 1934, the judgment of the Superior court was affirmed. (Verdung v. Bobrytzke et al., 275 Ill. App. 633.) November 8, 1934, petitioner was reinstated. Plaintiff, however, has not been paid any salary from his discharge on April 17, 1933, up to the time of his reinstatement on November 8, 1934. Defendant refuses to pay this salary although demand therefor has been made repeatedly. The salary of a patrolman under the Lincoln Park Commissioners and under the Chicago Park District is $180 a month, and if petitioner is entitled to recover for the entire time he was kept out of office there is due to him $3366. This amount the judgment orders defendant to pay.

It is urged for reversal that relator cannot recover because the evidence fails to establish the existence of any funds in the hands of defendants from which relator's salary can be paid; because a civil service employee cannot recover salary which has been paid to another civil service employee for performance of the same service whether the plaintiff has been lawfully or unlawfully kept out of the position; because the evidence does not show relator was ready, willing and able and had the physical capacity during the time in question to perform the duties of his position; because he failed to prove that the office or position claimed to have been occupied by him was legally created or that such office or position

was ever occupied by him; because petitioner was guilty of laches, and because the final order is defective, illegal, void and incapable of performance.

Mandamus is an extraordinary remedy. It was necessary for a relator to show the existence of a fund in the hands of defendants from which his claim could be paid. Defendants say there were no such funds in the hands of the Chicago Park District or its predecessor because the Lincoln Park Commissioners made no appropriation for salaries during the years 1933-1934 due to the fact that the law did not require that any such appropriation be made by them. We are not impressed with this contention. The law required the adoption annually of an ordinance known as the "tax levy ordinance" which was based on the needs of the Park District for the coming year, which ordinance designated the amounts of money to be expended for improvement, maintenance and government of the park during the next succeeding year. While these ordinances were not designated appropriation ordinances, they performed the functions of such an ordinance. The mere fact that the ordinances were called "tax levy ordinances" instead of "appropriation ordinances" is not, we think, material in view of the fact that no objection was raised by defendants upon the hearing on that ground. The answer does not deny that money for the payment of salaries for the position of patrolman, including the position held by plaintiff, was in fact secured through the enactment of these ordinances. On the contrary, the answer by inference admits that such money was received because it further alleges that this money was paid out to an unnamed person who performed the duties of the position of plaintiff. These "tax levy ordinances" were offered and received in evidence and show the estimate of money for the purpose of maintaining the police force for the district, which would include the salaries of the patrolmen. It is true that the

tax ordinances, as passed, estimated a definite amount to be raised for maintenance of the police department without specifically designating the particular salaries to which the money raised was to be allocated. Nevertheless, we think it was the duty of the commissioners to pay salaries of the patrolmen out of these funds as well as to pay for the equipment needed. Having lawfully obtained money wherewith to pay the salary pertaining to plaintiff's position it was the duty of the Lincoln Park commissioners to hold it for him and to turn it over to the Chicago Park District unless it was in fact paid to some other person for performing the duties pertaining to the plaintiff's position. As long as the position remained in existence the money obtained for the payment of the salary to the incumbent of the position could not be lawfully used for other purposes. True, want of funds is a complete answer to a petition for mandamus to compel the payment of the salary of a public employee. DeWolf v. Bowley, et al., 358 Ill. 530; People ex rel. Downs v. Brown et al., 281 Ill. 390. We think the uncontradicted evidence in this case indicates the existence of funds in defendants' hands by which the salary applicable to petitioner's position can be paid.

The contention that this fund out of which petitioner's salary was to be paid was in fact paid to another who performed the same service is not as a matter of fact established by the evidence. Defendants cite O'Connor v. City of Chicago, 327 Ill. 586, and Hittel v. City of Chicago, 327 Ill. 443, but the rule announced in those cases is not, as we think, altogether applicable here for the reason that petitioner's right to his office, which included the right to the salary thereafter payable, was established by judicial decision when the Superior court quashed the record upon which the discharge of petitioner was based. Defendants say that

petitioner showed that at the time of his suspension and discharge there were 173 patrolmen employed by the Lincoln Park commissioners, and that within three weeks after his discharge 11 additional patrolmen were assigned to duty; that there was an increase in the number of patrolmen actually in the service of the Park District after April 30, 1933; that on May 10, 1933, one officer was reinstated, and May 22, 1933, 10 new men were certified and appointed, and on May 31, 1933, one man was certified and another on September 14, 1933, so that at all times during the period from the date of suspension and discharge of petitioner to the date of his reinstatement there were more than 173 patrolmen actually employed by the Lincoln Park commissioners and paid their compensation. From these facts defendants draw the inference that the salary for petitioner's particular position was paid to another occupant of the office. Petitioner is unquestionably entitled to receive the salary from December 28, 1933, when the judgment on the writ of certiorari was entered, until November 8, 1934, when he was reinstated. The only period in which his salary could have been properly paid to another was for the time beginning April 17, 1933, when petitioner was suspended, until December 28, 1933, when the judgment on the writ of certiorari was entered. Under the decisions cited it might well be that petitioner could not recover the salary for such period if it had in fact been paid to some other person who actually performed the duties of the position. People v. Thompson, 316 Ill. 11, holds that a de jure officer or employee is entitled to recover salary from the date of a judgment on certiorari in his favor. This defense, therefore, if applicable at all would be applied only for the period of time beginning April 17, 1933, and ending December 28, 1933. The defense is an affirmative one. The evidence does not sustain it. It does not show that another employee was appointed

to the position held by petitioner, or did the work required from the occupant of that position, or was paid therefor by the Lincoln Park commissioners. The answer says that the salary was paid to an unnamed person. There is no proof of when it was paid or to whom. The mere fact that 11 additional patrolmen were within three weeks after plaintiff's discharge assigned to duty or that there was an increase in the number of patrolmen actually in the service of the Park District after April 30, 1933, or that on May 16, 1933, one officer was reinstated and that on May 22, 1933, 10 new men were certified and appointed, that on May 31, 1933, one man was certified and that on September 14, 1933, another man was certified, and that during all this period there were more than 173 patrolmen actually employed, does not show that the work required of plaintiff was performed by any other person who was paid the salary due to plaintiff. The evidence indicates that defendants from time to time employed additional officers according to the requirements of the public service. These duties performed by the various holders of positions were capable of division and subdivision. There was no person substituted to do the work of the petitioner, as was the case in Kenyon v. City of Chicago, 135 Ill. App. 227, upon which defendants rely. There is no proof that the position from which petitioner was unlawfully ousted was filled by a known person who was paid the salary. The burden was upon defendants to produce that proof. That no such person performed the duties and received the pay applicable to petitioner's position is indicated by the fact that no one was discharged or laid off from any position after plaintiff was reinstated. If his duties had been performed by someone else who was getting the salary, such person would necessarily be removed from that position and cease to receive the salary upon the reinstatement of plaintiff. There is no proof in the record that

anything of this kind occurred. The evidence of the fact (if it was a fact) was in possession of defendants and should have been produced. This defense is not sustained by the evidence.

Defendants' contention that plaintiff cannot recover because he was considered incapacitated for performance of his duties is another contention that cannot prevail, in view of the fact that in their answer defendants denied plaintiff had been injured while in the performance of his duties, and denied he became incapacitated for work due to his injuries. Petitioner plausibly contends that defendants having claimed on the trial that petitioner was not incapacitated by any injury from the performance of his duties, can not now make the claim that he was rendered physically unable to perform the duties of his position and prevent a recovery upon that ground. We think, too, that question is settled by the former judgment of the Superior court of Cook county and of this court in the certiorari proceedings.

Defendants also contend there was no proof in the record tending to show that a position of patrolman was legally created and occupied by petitioner. That fact also is, we hold, conclusively settled by the former judgments of the Superior and Appellate courts. Having been once adjudicated, that issue cannot now be a second time. Neither is there merit in the further contention of defendants that petitioner was guilty of laches. His claim that his discharge was unjustified and unlawful was put in issue in the certiorari suit in the Superior court, and the judgment of the Superior and Appellate courts on that question is final and conclusive. The rule that a petitioner must be diligent in instituting mandamus proceedings in order to recover a position from which he had been unlawfully ousted is not applicable to a proceeding for the recovery of salary to which he has become entitled by reason of a suit diligently prosecuted.

The reason for the rule which requires diligence in bringing an action to recover a position is the convenience of the public service. That rule petitioner complied with in the former litigation. As a result of that litigation he became entitled to his salary and the only bar that can be pleaded successfully in so far as laches is concerned is the Statute of Limitations. We hold that under the undisputed facts which appear in this record petitioner was entitled to a mandamus as prayed, that the order entered was in due form, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

39842

WINIFRED BAKER,
Appellee,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

294 I.A. 613

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Winifred Baker, the beneficiary named in two certificates issued to her husband at the time he was an employee of defendant Insurance company, in accordance with the group insurance policy issued by defendant in insuring its employees, brought an action to recover the face value of the two certificates with interest thereon. The jury found against defendant and assessed plaintiff's damages at $8000, being the face of the two certificates and interest at $2100. Judgment was entered on the verdict for $10,100 and defendant appeals.

There was a former trial of this case where, at the close of all the evidence the court struck out defendant's evidence, which tended to show the policy was not in effect because Baker was discharged January 7, 1932, and directed a verdict for plaintiff on the ground that the policy was incontestable after one year. An appeal was taken to this court where the judgment was reversed and the cause remanded. Baker v. Prudential Insurance Co., 279 Ill. App. 5. The pertinent provisions of the certificates and group policy and most of the facts will be found in that opinion and will not be repeated here, except in so far as may be necessary to state the reasons for our decision.

The record discloses that Gilbert W. Baker, the insured, was an employee of the Insurance company in Chicago, and on December 3, 1926, defendant issued its certificate for $4000 to Gilbert W.

THE PROPRIETAL INSURANCE
COMPANY OF AMERICA, a
Corporation,
Appellant.

vs.

Appellee.

MR. JUSTICE [illegible] delivered
the opinion of the court.

Winifred Baker, the beneficiary named in two certificates issued to her husband at the time he was employed at Lafayette Insurance Company, in accordance with the group insurance policy issued by defendant to Imperial Ice Company, brought action to recover the face value of the two certificates that subsequently matured. The jury found against defendant and judgment was entered in the amount of $4000, being the face of the two certificates and interest at 6%. Judgment was entered on the verdict for $4,100 and defendant appeals.

There was a former trial of this case which, it has been held, the evidence the court stands out sufficiently strong, in which the jury disagreed January 7, 1919, and directed a verdict for plaintiff on the ground that he should have one year. An appeal was taken to this court which [illegible] and the cause remanded. Baker v. Imperial Insurance Co., 276 Ill. App. 5. The pertinent provisions of the certificates and group policy and most of the facts will be found in that opinion and will not be repeated here, except it be for the purpose of the reasons for our decision.

The record discloses that [illegible], Inc., for [illegible], was employed at the Lafayette Insurance Company in January, 1920, [illegible] insured his wife [illegible] $4000 in [illegible].

Baker at his request, and a similar one dated June 1, 1928, in which plaintiff was named as beneficiary. Part of the premium was paid by his employer, the defendant, and part of it by Baker, defendant deducting the necessary amount from his salary. The certificates and policy were to be in effect only so long as Baker remained in the employ of defendant Insurance company. On the former appeal we said (p. 10): "It is clear that the policy covered only the employees of the insured. It did not cover an employee after he had been discharged. After his discharge he had the right to take out a policy for himself, if he so desired, in accordance with the provision for conversion." January 7, 1932, Baker was discharged because he was short in his accounts. The home office was notified of this fact January 22, 1932. He never did any work for defendant after January 7 and died February 7, 1932, at Indianapolis, Indiana. It is said in the briefs he committed suicide. The premiums on the certificates were paid, as was the custom, during the first week of January, 1932, for the entire month of January. The sole question for decision was whether the policy was in effect when Baker died, February 7, 1932.

Plaintiff's contention is that the burden was on defendant Insurance company to show by a preponderance of the evidence that Baker was not in the employ of defendant Insurance company at the time of his death; that it failed to meet the burden because the jury found against defendant, and the finding is not against the manifest weight of the evidence but is sustained by the evidence. Defendant's position is that the burden of proof was on plaintiff to show that the insured at the time of his death was employed by defendant. Although the court orally instructed the jury in accordance with defendant's contention, it found for plaintiff. This question was passed upon by another division of this court in Sturmer v. Travelers Ins. Co., 279 Ill. App. 607, in an opinion by Mr. Justice Wilson, now a member of our Supreme court, where

the authorities were discussed and it was held that the burden was on defendant. But in view of the result we have reached in this case the question is not of importance, for we are of opinion that there should have been a directed verdict for defendant at the close of all the evidence, as it requested.

Albert A. Benson, called by defendant, testified that he was an employee of defendant and had supervision over the district in Chicago where Baker was employed, with the same powers as a superintendent; that Baker was employed by "my office as an agent;" that the last time he saw Baker was on the evening of January 7, after Baker had rendered his account to defendant's assistant superintendent; that Baker's shortage, the signing of a check by Baker without authority and his using the money were discussed at that time; "I then instructed Mr. Runzel (the assistant superintendent) to take the collection book and told Mr. Baker that he was through. He looked at me from across the table and he said, 'Do you mean that I am through?' I said, 'Well, after signing an insured's check, why, yes you are through,' and Mr. Runzel was to take the book and make all collections, that he was not to have any part in conducting the company's business." On cross-examination Benson said he testified on the former trial concerning the forgery of the check.

Runzel, the assistant superintendent at defendant's offices where Baker was employed, testified that he saw Baker on January 7th and corroborated Benson as to what was said and done; that Benson said to Baker at that time, "because of a forged endorsement on a check that he would be forced to dispense with his services at that time;" that Benson then took the books away from Mr. Baker and that after January 7 witness had charge of the district theretofore covered by Mr. Baker. The witness further testified he received a letter dated the day following, January 8, from Baker, which is in evidence, in which Baker wrote: "Enclosed find list of shortage -

which will make it easy to find after my Insurance is paid. My wife will pay you this amount and you can square with these people. I don't want anyone to lose a cent on a/c of me. See Andy and find out how much I owe him and square that too. Please don't peddle this around the debit. Leave my memory with the people as good as possible."

Plaintiff, Mrs. Baker, testified that on January 9th she called at defendant's place of business where Mr. Baker had been employed and talked to Mr. Benson; that Mrs. Fitch was with her; that she asked Mr. Benson if there was any salary coming to Mr. Baker that she could have; that Benson told her Mr. Baker was an employee of the company and he could not give any salary to any one but him; that he was still working for them; that she asked him if there were any premiums due on Mr. Baker's insurance and he said everything had been paid; that about a week later, accompanied by Mrs. Fitch, she again called and Mr. Benson again told her that Mr. Baker was still an employee of the company, and he could not pay any of his salary to her. She further testified that her husband disappeared January 7 and she received notice of his death on February 7. Mrs. Fitch corroborated the testimony of plaintiff as to both conversations.

Records of the home office in New Jersey showed that Baker was employed by defendant Insurance company "from October 25, 1926, as an agent in Chicago 4 District, which position he held up to the time of his 'final' January 8, 1932, at which time he was let out of our service for misappropriating cash surrender funds and withholding ordinary premiums."

There is other evidence in the record as to whether Benson had authority to discharge Baker, and as to whether Baker was discharged on January 7; but we think it all shows that Baker was discharged on the evening of January 7; that the next day he wrote a

letter, from which we have above quoted; that he never again worked for defendant and died the following February 7.

Plaintiff's counsel in their brief argue that according to the testimony of Mrs. Baker and Mrs. Fitch defendant did not act fairly in telling her that Baker was still employed by the company and in not informing her "that a situation had risen under which his insurance would be cancelled. *** It not only failed in this respect, but by its actual representations to Mrs. Baker and by its silence so far as Baker is concerned it permitted these people to proceed under the assumption that the insurance was in force." We think this is wholly immaterial because there was nothing Mrs. Baker could do at that time. There was no premium to be paid because he had been discharged. Moreover, as we said on the former appeal (279 Ill. App. 5, p. 12): "Had Baker lived he could not have paid the premium to the defendant insurance company; that was payable by his employer although part of the money would come from him. The employer could not pay the premium for February because it had theretofore discharged Baker." We think all the evidence shows that Baker was discharged on January 7, 1932; that the premiums had been paid for the balance of that month and the policy was not effective after January 31, 1932. This was before Baker died, and no recovery can be had.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

McSurely and Matchett, JJ., concur.

39847

RAECHEL T. KAUDERS,
Appellant,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

294 I.A. 614

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

February 27, 1934, defendant issued its policy for $10,000, payable in monthly installments of $96.10, over a period of ten years, insuring the life of Sidney T. Kauders, husband of plaintiff, the beneficiary named in the policy. He died April 16, 1935. Defendant denied liability, claiming the policy was void because the insured knowingly made false answers to material questions put to him in his application for insurance. Plaintiff brought suit to recover three monthly installments with interest, aggregating $309.92. The jury returned a verdict in plaintiff's favor for the amount claimed; afterward the court entered judgment in defendant's favor notwithstanding the verdict, and plaintiff appeals.

The record discloses that December 16, 1933, Kauders, who had been a traveling salesman for about 35 years and was then about 57 years old, signed an application for insurance with defendant company. The application was in two parts. A policy issued pursuant to that application but February 24, 1934, was surrendered to be "reissued and re-dated in accordance with this application, register date to be February 15, 1934. Restrict beneficiary to Option Two of Modes of Settlement at Maturity, providing payments monthly for ten years." The date the application was signed, December 16, 1933, Kauders appeared at defendant's Chicago offices before Dr. Earl Shaffer, who examined him for insurance by defendant company. A photostatic copy of the application is in the record. One of the

RASCOLL J. KAUD MA,
Appellant,

vs.

THE MUTUAL LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
a Corporation,
Appellee.

294 I.A. 614

BY PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

February 27, 1934. Defendant issued its policy, for $10,000, payable in monthly installments of $84.10, over a period of ten years, insuring the life of Sidney T. Masters, nephew of plaintiff, the beneficiary named in the policy. He died April 16, 1933. Defendant denied liability, claiming the policy was void because the insured knowingly made false answers to material questions put to him in his application for insurance. Plaintiff brought suit to recover three monthly installments with interest, aggregating $309.92. The jury returned a verdict in favor for the amount claimed; afterward the court entered judgment in defendant's favor notwithstanding the verdict, and plaintiff appeals.

The record discloses that decedent in 1930, Sandefer, who had been a traveling salesman for about 25 years and was then about 57 years old, at his application for insurance with defendant company. The application was in two parts. A policy issued pursuant to that application but February 21, 1931, was surrendered to be reissued and re-dated in accordance with this application, reciting date to be February 10, 1931. Policies immediately in force at modes of settlement at maturity, providing payments monthly for ten years." The date the application was signed, December 16, 1930, Saunders appeared at defendant's Chicago offices before Dr. Burt Shaffer, who examined him for insurance by defendant company. A photostatic copy of the application is as follows:

questions was, "Have you ever been treated for any disease or disturbance of the stomach, liver, intestines, kidney or bladder?" The answer was "Yes, Puncture of Sigmoid due to chicken bone," duration 3 weeks, that the result was "Good Ok. since." Another question was whether the applicant had ever "been advised to have a surgical operation." The answer was, "Yes, Repair of Puncture of Sigmoid in 1927," and that the result was "Good." The application further shows that the applicant had $7,000 worth of life insurance then in force and $2,000 of other insurance in the Royal Arcanum. In answer to another question he said he had not been treated by a physician within the past 5 years.

Kauders in his work as a traveling salesman traveled extensively over this and other countries for about 35 or 40 years, and after the policy was issued in February, 1934, he continued with his work and made a trip nearly across the continent. In the latter part of May, 1934, he became ill and called on the family physician, Dr. Cliver, who treated him for several weeks; thereafter he apparently continued his work as a traveling salesman, and April 1, 1935, went to a hospital in Philadelphia in a very serious condition. He was operated on at the site of the trouble caused by the chicken bone; the Doctor testified that "when the abdomen was operated there was found a diverticulum of the sigmoid colon, to which several coils of the small intestine were adherent;" that a diverticulum is an abnormal enlargement or pouch of the intestine. Kauders died - apparently at the Philadelphia hospital - April 16, 1935.

Counsel for plaintiff say the burden of proving fraud in the application for the insurance policy is on defendant company. Defendant admits this and contends that it not only sustained the burden of proof but that all the evidence sustained its defense, as a matter of law.

Defendant called Dr. Cliver who testified: "I presume I was the family physician;" that he treated Mr. and Mrs. Kauders and their two daughters; that he could not recall when he first treated Mr. Kauders but it was before January, 1934, - a year and a half to his best recollection; that he first treated him for a dry nose and pelvic congestion caused by sitting too long in pullmans; that he could not remember the details of the first treatment; that Kauders complained of indigestion, having sat on trains for 2 or 3 days; that he had records with him which showed the dates he treated the family. The records were produced and were headed, "Mrs. Sidney T. Kauders." They simply showed the dates he made charges, covering the years from 1930 to 1936, both inclusive. Mr. Kauders' name is not mentioned. The Doctor testified he could not tell from the card which member of the family he had treated on the specific dates; "I recall that before or around January, 1934, I had occasion to see Mr. Kauders about five times in the course of two weeks or so;" that he last treated him in May, 1934. He was then shown a letter which counsel for both sides agree was written to defendant by the Doctor in May, 1935, about a month after Kauders death. The letter was not introduced in evidence but apparently was written by the Doctor at the request of some representative of defendant. The Doctor examined the letter but could not recall the facts except that he would not have written it if he did not think it spoke the truth. Witness read from the letter, "Mr. Kauders first became a patient of mine December 1933. From the 14th to the 26th of that month I saw him from time to time. In May and June, 1934, I again saw him some six times. In all the visits the complaint was of the same nature, *** sinus trouble, some irritation due to hypertrophied prostate, and some intestinal distress that was attributed to known colitis and also possibly due to adhesions around the site of a previous operation." On cross-examination the Doctor tes-

tified the letter was written about a year and a half after December, 1933; "I attached no special importance to it; it was one of the things to be done in order to facilitate the collection of Mr. Kauders' insurance, as I understood there was no contest of any kind involved;" that he had no written memorandum at the time he prepared the letter; that at the time he treated Kauders in December, 1933, he did not know about the chicken bone and the puncture of the sigmoid; that this information came to him later; that in May, 1934, when he treated Kauders, he found that he needed "serious attention;" that when he treated him the prior December he sprayed his nose, and his stomach was upset; that he did not consider Kauders in any way a sick man until May or June, 1934; that at that time he took X-ray pictures and found that Kauders had a chronic or serious ailment which endangered his life; that he prepared a memorandum of what he found in May, 1934, which he produced, in which he wrote, "About seven years ago had an emergency operation because of swallowing a chicken bone which perforated the sigmoid. Had local peritonitis. *** always full of gas, always sleepy during the day," etc.

Dr. Shaffer, who examined applicant for defendant, called by defendant, testified that he examined Kauders and was shown the application which he signed on December 16; that he made a "routine physical examination of the essential portions of the human body;" that he found nothing which made him believe that Kauders' story was false. On cross-examination he testified that he had no distinct recollection except what appears from the written application; that the examination was made at defendant's Chicago offices; that he was employed part time by defendant; that the examination of the lungs disclosed nothing wrong. One question, "Do you find upon examination any abnormality of the abdomen, stomach, liver, spleen and so forth?" was answered "No." He further wrote that he found nothing unfavorable in Kauders' general appearance. He further states what he did and

found; that Kauders told him he had a puncture of the sigmoid in 1927 followed by an operation; that he did not find anything to indicate Kauders was not a fit risk.

Dr. Phillips, an interne in the hospital in Philadelphia in 1935, asked Kauders questions and wrote a history of what Kauders told him; this was a few days before the operation was performed there. The history as written by the Doctor is in evidence and formed a part of the hospital record. It shows that Kauders lost 16 pounds in weight from June, 1934, to January, 1935, and from January to April, 1935, 8 pounds; lost all appetite for 2 years; tired, toxic feeling - 18 months; bowel movemements 3 to 15 times in 24 hours; nausea after meals; chills at night - about 12 during the last 2 years; his past history showed Kauders always very healthy; medical treatment about 1½ years; did not stop work; no heart or kidney diseases; accepted for life insurance; complete examination 7 years ago; father of 3 strong children; traveling salesman for about 40 years; swallowed chicken bone 8 years ago; 3 days later bone found in sigmoid and removed. Had peritonitis; ill for ten days after operation. Returned to work in about 8 weeks; felt as well as he ever did for about 6 years. "In April '33, began to get attacks of 'indigestion,'" etc., had bowel trouble; felt toxic for 1½ years; lost 22 pounds in weight; during past 2 months symptoms became more prominent; traveling nearly all the time.

Dr. Mock, called by defendant, testified as a medical expert. The usual hypothetical questions were put to him and he testified that in his opinion the diverticulum found at the time of the operation at Philadephia in 1935, "was the diverticulum of the sigmoid, evidently developed at the site of the previous injury, from the beginning down to the second operation," and that a diverticulum caused symptoms of diarrhea; toxic feeling, bowel disturbances, etc.,

which would tend to seriously impair the affected person's health "over a period of time."

Plaintiff contends that the court erred in permitting Dr. Cliver, over her objections, to read (1) from the memorandum which he prepared about 6 months after plaintiff made his application; (2) to read from the letter he wrote in May, 1935, to defendant or its representative; (3) Dr. Oliver's records as to services rendered to the Kauders family because Mr. Kauders' name was not mentioned; and (4) the record made by Dr. Phillips at the hospital in Philadelphia. These documents and the contents of them we have discussed. We think they were all properly admitted. They were prepared about the time the several things therein stated took place. The person who prepared them gave testimony to the effect that the facts were correctly recorded. This would render them admissible although the witnesses had no independent recollection and their recollections were not refreshed by an examination of the documents. Koch v. Pearson, 219 Ill. App. 468.

Defendant contends that Kauders' answers to questions put to him by Dr. Shaffer were knowingly false; that they were material and that it was immaterial what the applicant's intent was in making them; that Dr. Cliver, the applicant's family physician, testified he first treated him a year and a half or two years prior to January, 1934, when he complained of indigestion; that before or around January, 1934, the Doctor saw the applicant about 5 times in the course of 2 weeks or so; that the applicant's statement made to Dr. Phillips in the hospital in Philadelphia shows that he had attacks of indigestion in 1933 which lasted for 2 or 3 days and were accompanied by bowel disturbances and sometimes chills and fever; that the applicant had been treated by a physician a number of times before he signed his application on December 16, 1933, and was being treated at and after that time and before the policy issued; that his answer that

"over a period of time."

Plaintiff contends that the court erred in granting Dr. Oliver's motions. It read (1) [illegible] to dismiss [illegible] he rendered about 3 months after plaintiff made his application; (2) to read from the letter on stare in any, 1934, to determine as its representative; (3) Dr. Oliver's records at to accurate rendered to the Sanders [illegible] Doctors' [illegible] mentioned; and (4) the record made by Dr. Infirmo at the hospital in Philadelphia. These documents and the contents of them we have discussed. To this they were all properly admitted. They were prepared about the time the several items to [illegible] took place. The person who prepared them gave testimony to the effect that the facts were correctly recorded. This would render them admissible although the statements and no independent recollection and their recollections were not refreshed by [illegible] of the documents. Ency. Evidence, XIV 111. Apx. 602.

Defendant contends that Sanders' answers to questions put to him by Dr. Shaffer were unnecessarily [illegible]; that they were material and that it was immaterial what the application's [illegible] to writing them; that Dr. Oliver, the physician's family physician, treated he first treated him a year and a half or two years prior to January, 1934, when he complained of [illegible]; that before or around January, 1934, the Doctor and the applicant spent a time in [illegible] of 2 weeks or so; that the applicant's [illegible] made to Dr. Shaffer in the hospital in Philadelphia where [illegible] or had chronic or [illegible] tion in 1933 which lasted for 2 or 3 days and were accompanied by bowel disturbances and sometimes [illegible] and fever; that the applicant had been treated by a physician a number of times prior to [illegible] his application on December 14, 1934, and was being treated at and after that time and before the policy issued; that the answer that

he had not been treated by a physician in the last 5 years was knowingly false and material; that it is immaterial that the applicant may have thought his false statements were of no consequence, or that he had no fraudulent intent. Defendant's counsel say, "As a matter of law knowingly false representations will avoid a policy if they are in fact material, even though the maker thereof failed to realize their materiality." We think this is a correct statement of the law. Joseph v. N. Y. Life Ins. Co., 219 Ill. App. 452; Cross v. Prud. Ins. Co., 279 Ill. App. 645 (abst.); Tanner v. Prudential Ins. Co., 283 Ill. App., 210; Janelunas v. Chicago Frat. Life Assoc., 286 Ill. App. 219. The question then remains whether the representations made by Kauders in his answers were material. Both sides agree that if Kauders was treated by a physician during the 5 years preceding his application for insurance, any misrepresentations made by him in this respect would not be material if the treatment was "so trivial that a reasonably prudent and intelligent person would not expect it to have any affect upon the willingness of the insurance company to grant the policy applied for," and the court so instructed at defendant's request.

We have above set forth rather fully the testimony of Dr. Cliver as to the nature of the treatments he gave Kauders before the issuance of the policy, which tended to show that Kauders' health was not impaired at that time; and the most that can be said is that whether he was treated for some trivial matter only was a question for the jury. Upon a careful consideration of all the evidence we are unable to say that the finding of the jury to the effect that treatments given to Kauders by the Doctor prior to the date of the policy were so trivial as not to affect the Insurance company in issuing the policy, is not manifestly against the weight of the evidence. Moreover, Kauders, being examined by Dr. Shaffer for insurance, told Dr. Shaffer that in 1927 he had been operated on for

a puncture of the sigmoid due to swallowing a chicken bone, and Dr. Shaffer's written report to defendant company made at the time shows that he examined Kauders' abdomen and found nothing wrong. All the evidence shows that his subsequent ill health and death resulted from the puncture of the sigmoid; this would warrant the jury in finding that Kauders did not conceal material facts as to the state of his health at the time he applied for the insurance. It has been held that where an applicant for insurance denied having consulted or been treated by a physician within a number of years prior to the application, and the evidence showed he had consulted or been treated by a physician during such period, that if the matters for which he had consulted or been treated were of a trivial nature, it was not such a material misrepresentation as would prevent a recovery. Krauza v. Golden Seal Assurance Society, 247 N. Y. 536, 161 N. E. 172; Meyers v. Met. Life Ins. Co., 219 N.Y.S. 756; Modern Woodmen, etc. v. Miles, 178 Ind. 105, 97 N. E. 1909.

Upon a consideration of the entire record we are of opinion that the questions were properly submitted to the jury, and the court should have entered judgment on the verdict.

The judgment of the Superior court of Cook county is reversed and the cause is remanded with directions to enter judgment on the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely and Matchett, JJ., concur.

39869

FRIEDA GERARD,
Appellant,

vs.

HARRY J. GUYON, Individually and as Executor of the Instrument purporting to be the Last Will and Testament of Marie Bopp, Deceased, ANNA ALBRECHT, MINNIE ALBRECHT, TILLIE ALBRECHT,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 614

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Frieda Gerard filed her complaint in chancery praying that the instrument purporting to be the last will and testament of her mother, Marie Bopp, be declared not to be her will, and that the probate thereof be set aside on the ground of mental incapacity and undue influence. At the close of plaintiff's case, on motion of defendant, there was a directed verdict that the "instrument in writing purporting to be the last will of Marie Bopp" was her last will and testament; a decree was entered in conformity with the verdict, and plaintiff appeals.

The record discloses that in September, 1934, Marie Bopp, then about 76 years old, entered the German Old People's Home at Forest Park, Illinois, and on November 17 executed the will in question. Thereafter, on January 2, 1935, she died. The will was admitted to probate by the Probate court of Cook county May 2, 1935. She had been married a number of times and left her surviving as her only heir at law and next of kin the plaintiff, her daughter. Plaintiff at the time was the mother of two children. Deceased left an estate of more than $5000 and the will provided that after payment of her debts a bequest of $10 was to be paid to her daughter, the plaintiff, "and I make this bequest to her for good and sufficient reasons." The balance of the estate was divided between Anna Albrecht,

MELINDA GERARD,
Appellant,

vs.

HARRY J. DUYON, Individually and as Executor of the Instrument purporting to be the last Will and Testament of Marie Bopp, Deceased, ANNA ALBRECHT, WINNIE ALBRECHT, TILLIE ALBRECHT,
Appellees.

294 I.A. 614

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Melinda Gerard filed her complaint in chancery praying that the instrument purporting to be the last Will and testament of her mother, Marie Bopp, be declared not to be her will, and that the probate thereof be set aside on the ground of undue influence and undue influence. At the close of plaintiff's case, on motion of defendant, there was a directed verdict that the "instrument in writing purporting to be the last will of Marie Bopp" was her last will and testament; a decree was entered in conformity with the verdict, and plaintiff appeals.

The record discloses that in September, 1894, Marie Bopp, then about 75 years old, entered the premises [illegible] in Forest Park, Illinois, and on September 17 executed the will in question. Thereafter, on January 6, 1899, she died. The will was admitted to probate by the probate court of Cook county July 3, 1922. She had been married a number of times and left her surviving as her only heir at law and next of kin the plaintiff, her daughter. Plaintiff at the time was the mother of two children. Deceased left an estate of more than $5000 and the will provided that after payment of her debts a bequest of $10 was to be paid to her daughter, the plaintiff, "and I make this bequest to her for good and sufficient reasons." The balance of the estate was divided between [illegible]

a neighbor of the testatrix, and Anna's two daughters, share and share alike, or to the survivor of them.

Since we have reached the conclusion that the cause must be tried, we refrain from discussing the evidence except so far as it is necessary to do so to state the reasons for our decision.

The evidence tends to show that in February, 1934, the testatrix made a gift of her real estate to John and Lena Creaney by executing a warranty deed to them, and sometime afterward she gave them a mortgage securing an indebtedness of $1600 and told them, "If you collect on that you can give me $500 out of it." The mortgage was afterward foreclosed by the Creaneys. Subsequently an intervening petition was filed in the foreclosure suit, apparently on behalf of Mrs. Bopp, claiming that she was the owner of the mortgage note or the property. About this time Mrs. Bopp went to live at the Old People's Home. The evidence further shows that Mrs. Bopp was unable to read or write the English language; that Anna Albrecht and her two daughters, the beneficiaries under the will, were neighbors of Mrs. Bopp but they had not been particularly intimate at any time.

A witness testified that she had known Mrs. Bopp for probably 50 years; that she "lived across the way" from Anna Albrecht, one of the beneficiaries, and did not know that Mrs. Albrecht was a friend of Mrs. Bopp; that she never saw Mrs. Bopp at Mrs. Albrecht's home; that although witness knew Mrs. Bopp intimately for many years, on certain occasions when they met Mrs. Bopp did not know who she was.

Two physicians testified on the issue of mental incapacity, one that he was in charge of the medical department of the Old People's Home and had examined testatrix several times before she was admitted to the Home; that when she was admitted her mental condition was good for one of her age but that loss of memory took

place shortly thereafter. The other Doctor testified that she had been one of his patients for several years; that she had suffered from chronic nephritis, arteriosclerosis, etc.; that she had a very poor memory, was hard of hearing, was more or less "flighty" which he attributed to her physical condition, and that in his opinion she was not altogether responsible for some of the things she did. A clergyman testified that Mrs. Bopp was a memberof his parish and that he had known her since 1920; that she was highly excitable and had a feeling she was being abused by her relatives, and that so far as he knew the charges were unsound; that at one time she contributed $25 to the church but said she gave $300. Other witnesses gave testimony to the effect that the testatrix's memory was bad and that often she did not appear to know what she was doing. Another witness testified that testatrix came to her home in the spring of 1934 and claimed that plaintiff, her daughter, had attacked her, and witness gave as her opinion that testatrix was not responsible for her actions.

Whether a person had the mental capacity to make a will is determined by whether he was able to understand the matter in which he was engaged. Trish v. Newell, 62 Ill. 196. Whether there was such undue influence as would vitiate an instrument purporting to be a will may be shown by circumstantial evidence. Peters v. Fekete, 329 Ill. 268. The disposal for little or no consideration, and without apparent reason, of much valuable property by a testatrix to persons to whom he was under no particular obligation, tends to show unsoundness of mind. Dillman v. McDanel, 222 Ill.276.

In the instant case the evidence tends to show that Mrs. Bopp was 76 years of age, in bad health, could not read or write the English language, was hard of hearing; that she gave considerable of her property to the Creaneys without consideration and for no reason; that she was prejudiced against plaintiff, her daughter,

that Anna Albrecht, one of the beneficiaries, was at Mrs. Bopp's home days and nights of July, 1934, and this continued until Mrs. Bopp went to the Old People's Home; that on one of such occasions Mrs. Bopp said, "When I am gone Frieda, my daughter, will have to take care of it all;" that Mrs. Albrecht replied that the Home would take care of everything.

Upon a consideration of all the evidence in the record we are of opinion that the questions involved should have been submitted to the jury.

The decree of the Circuit court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

39883

POCAHONTAS COAL SALES COMPANY,
a Corporation,
Appellee,

vs.

QUALITY COAL SALES CO., a Corporation,
EDWARD E. MEYER and PAUL BUSCHMANN,
Doing Business as BRUNSWICK FUEL CO.

QUALITY COAL SALES CO., a Corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

294 I.A. 614

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover $1549.59, being the claimed balance due it for coal sold and delivered to defendants. Each of the defendants filed an answer denying liability. In its complaint plaintiff alleged that it did not know whether Russell Frei was acting for Quality Coal Sales Co. or for Buschmann and Meyer in ordering and receiving the coal. There was a trial before the court without a jury, a finding in plaintiff's favor for the amount of its claim, judgment was entered on the finding against each defendant, and defendant Quality Coal Sales Company, a corporation, alone appeals.

The only question raised by defendant is that the finding and judgment are against the manifest weight of the evidence.

The record discloses that on December 1, 1934, the Quality Coal Sales Co. entered into a written contract with Buschmann and Meyer, copartners doing business as Brunswick Fuel Company, the substance of which was that the Quality Coal Sales Co. had a lease on the premises at 1825-1835 North Damen avenue, Chicago, and Buschmann and Meyer were to operate the coal yard there, selling coal for the Quality company, for which they were to receive a consideration. The parties proceeded to carry out the agreement and after a time there was considerable trouble between them over the possession of

the yard and other matters. Afterward the contract between them was modified so that Buschmann and Meyer were to receive a commission only on the coal they sold. The contract was afterward cancelled and there was considerable litigation between the parties. About August 1, 1935, Quality Coal Sales Co. sent a man to take charge of the coal yard. Coal was bought principally from the Quality Coal Sales Co. and sold by Buschmann and Meyer. There was other coal bought from plaintiff, the Pocahontas Coal Sales Co. There is no dispute that the coal in question was delivered to the coal yard and that the amount claimed to be due by the Pocahontas Co. is correct and unpaid, the only controversy being as to whether the amount was due and owing from the Quality Co. or from Buschmann and Meyer. There was a great deal of evidence introduced on the trial; witnesses testified, some to the effect that no coal was bought by the Quality Coal Sales Co. from plaintiff; that no one had authority from it to purchase the coal; that the yard was always operated in the name of the Brunswick Fuel Co., although the Quality Coal Sales Co. had a man at the yard to protect its interest and see that the coal it delivered to the yard was paid for, etc. Buschmann and Meyer were also at the yard. There is other evidence that the coal in question was purchased for the Quality Coal Sales Co. by its representative, Russell Frei. A number of witnesses gave testimony touching this vital point of the controversy. The evidence is irreconcilable, in fact counsel for the Quality Coal Sales Co. in their brief say: "In the instant case there is a mass of conflicting evidence upon every material point," but they further say that a consideration of the evidence discloses that the coal was not purchased by the Quality Coal Sales Co., but by Buschmann and Meyer.

We have carefully considered all the evidence in the record and are of opinion that it would serve no useful purpose to detail

it here. It is sufficient to say that there was evidence to the effect that the coal was ordered by Frei from plaintiff, delivered to the yard and that part of it was not paid for. Frei testified that during these purchases he talked with Mr. O'Connor and Mr. Hoskins of the Quality Coal Sales Co., and "after these discussions with Mr. Hoskins, I would purchase the coal;" that they discussed "with me the Pocahontas coal that was coming in." The evidence further shows that the purchase in question and all the sales of coal at the yard were made in the name of the Brunswick Fuel Co. and immediately after the sales the account was assigned to the Quality Sales Co.; that part of the money for the sale of the coal in question was collected and that all coal handled at the yard was paid for by checks of the Brunswick Fuel Co., and were all countersigned by a representative of the Quality Coal Sales Co. Frei further testified that he purchased all of the Pocahontas coal from plaintiff on instructions from Mr. Hoskins of the Quality Coal Sales Co., and that none of it was purchased by Buschmann and Meyer. The testimony of this witness is contradicted by Mr. O'Connor, Mr. Hoskins, and others, such testimony being to the effect that none of the Pocahontas coal was purchased by the Quality Coal Sales Co., and each of the witnesses denied the substance of all of the testimony of the witness, Frei. The evidence as to the buying and selling of coal at the yard, the keeping of the accounts and the payment of bills was so conflicting that we think the question was for the trial Judge, who was in a better position to determine the truth of the matter in controversy than we are, having but the printed page before us. It is clear that we would not be warranted in disturbing the finding of the trial Judge on the ground that it was against the manifest weight of the evidence.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

39884

J. K. DERING COAL MINING CORPORATION, a Corporation,
Appellee,

vs.

QUALITY COAL SALES CO., a Corporation, EDWARD E. MEYER and PAUL BUSCHMANN, doing business as BRUNSWICK FUEL CO. - Defendants,
Appellants.

Quality Coal Sales Co, et al

574

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

294 I.A. 614

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants to recover $489.21, balance due to it for the sale of coal which it delivered at a coal yard at 1835 North Damen avenue, Chicago. In its complaint plaintiff alleged that he did not know which of the defendants was operating the coal yard under the name of Brunswick Fuel Co. There was a trial without a jury, a finding and judgment in plaintiff's favor for $479 against each defendant, and the defendant Quality Coal Sales Company alone prosecutes this appeal.

The sole contention for a reversal is that the finding and judgment are against the manifest weight of the evidence.

On the hearing it was stipulated that the evidence introduced in the case of Pocahontas Coal Sales Co. v. Quality Coal Sales Co. et al., No. 39883, in which we have this day filed an opinion, might be considered so far as it is pertinent. The Pocahontas Coal Sales Co. case was tried about a month before the trial of the instant case. Very little other evidence was offered in the instant case. What we said in case No. 39883 is applicable in this case, and for the reasons there stated we are of opinion we would not be warranted in disturbing the judgment as being against the manifest weight of the evidence.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

other

39926

FRANK HRUBY,
Appellee,

vs.

ANTON JANURA, Mayor, City of Berwyn, Illinois, THE CITY OF BERWYN, Illinois, a Municipal Corporation, EBER J. HUBBARD, Jr., JOSEPH HOLUB and FRANK A. KALABZA, as Members of the Fire and Police Commission of the City of Berwyn, Illinois,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 614

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a petition for mandamus whereby plaintiff sought the position of driver in the fire department of the City of Berwyn and also back salary; upon trial by the court the writ was ordered, commanding that defendants assign plaintiff to his position as a de jure driver and engineer of the fire department of the City of Berwyn and pay him $1980 a year from April 11, 1935. Defendants appeal.

Defendants first say that plaintiff has failed to show his clear legal right to the office he seeks. It is well settled that the plaintiff in such a case must show that he has a clear right to the relief he seeks. Moon v. The Mayor, 214 Ill. 40, 43, and cases there cited.

Both in the allegations of the petition and in the evidence plaintiff shows that he is uncertain and confused as to the particular office to which he claims to be entitled.

Plaintiff testified that he had been a member of the Berwyn fire department as a driver from May 15, 1915, and continued in that capacity until sometime in 1925 when he was appointed by the Mayor of Berwyn as acting fire chief and served in this capacity until April 15, 1931; that in 1926 the City of Berwyn adopted the "Fire and Police Commissioner's Act," creating a Board of Fire and Police Commissioners; that in 1926 he took and successfully passed an

FRANK MAHONY,

Appellee,

vs.

ANTON JANURA, Mayor, City of Berwyn,
Illinois, THE CITY OF BERWYN,
Illinois, a Municipal Corporation,
JOHN J. CUNNEEN, Jr., Joseph MOLIS
and FRANK A. KABELKA, as Members of
the Fire and Police Commission of
the City of Berwyn, Illinois,
Appellants.

294 I.A. 614

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This is a petition for mandamus whereby plaintiff sought the position of driver in the fire department of the City of Berwyn and also back salary; upon trial by the court the writ was awarded, ordering that defendants assign plaintiff to duty position as a fire driver and engineer of the fire department of the City of Berwyn and pay him $1900 a year from April 1, 1938. Defendants appeal.

Defendants first say that plaintiff has not shown his clear legal right to the office he seeks. It is well settled that the plaintiff in such a case must show that he has a clear right to the relief he seeks. People v. The Mayor, 114 Ill. 50, 55, and cases there cited.

Both in the allegations of the petition and in the evidence plaintiff shows that he is a veteran and employed as in the particular office to which he claims to be entitled.

Plaintiff testified that he had been a member of the Berwyn fire department as a driver from May 11, 1933, and continued in that capacity until sometime in 1938 when he was appointed to the fire department as acting fire chief and served in that capacity until April 18, 1938; that in 1939 the Civil Service Commission of Berwyn and Police Commissioners' Act," providing a board or else any police

examination given by the board and was placed upon the eligible list as a de jure driver; that he acted as fire chief until April 15, 1931.

The trial court ordered defendants to assign plaintiff to his position "as a De Jure Driver and Engineer of the Fire Department" of Berwyn. There is no allegation or proof tending to show the creation of the office of Engineer.

The evidence clearly shows that plaintiff considered himself as a personal appointee of the mayor, in which case he would hold his position at the mere sufferance of the mayor. We hold that the evidence was insufficient to establish the existence of the offices to which the trial court ordered plaintiff to be assigned, and also failed to show that he had a clear legal right to these offices.

A further consideration, which requires a reversal of the order of the Circuit court, is that the evidence clearly shows that plaintiff abandoned his position and employment with the fire department in April, 1931. Plaintiff testified that he had a nervous breakdown in 1931 and that Mayor Novotny gave him a leave of absence and told him to take his time; that he was also told the same thing by Commissioner Kriz. Both Mayor Novotny and Commissioner Kriz died before these proceedings were instituted.

The attorney for plaintiff testified that plaintiff requested him to make an application for a furlough. The rules and regulations of the board provide that the board may for good and sufficient cause grant to any member of the fire department a furlough or leave of absence from duty for a period not exceeding one year. There was no evidence that the commissioners ever granted plaintiff a furlough or leave of absence from duty.

There was a suggestion in the testimony of Joseph Dolezal, appointed as acting chief on April 14, 1931, when plaintiff left

examination given by the board and was placed upon the eligible list as a de jure driver; that he took an oath of office April 15, 1931.

The trial court ordered defendants to reinstate plaintiff to his position "as a de jure driver and Engineer of the fire Department" of Perry. There is no allegation or proof tending to show the cremation of the office of Employer.

The evidence clearly shows that plaintiff considered himself as a personal appointee of the mayor, in which case he would hold his position at the same entirance of the mayor. He held that the evidence was insufficient to establish the existence of the offices to which the trial court ordered plaintiff to be assigned, and also failed to show that he had a clear legal right to these offices.

A further consideration, which requires a reversal of the order of the circuit court, is that the evidence clearly shows that plaintiff abandoned his position and employment with the fire department in April, 1931. Plaintiff testified that he had a nervous breakdown in 1931 and that Mayor Borough gave him a leave of absence and told him to take his time; that he was also told the same thing by Commissioner Kris. John Mayor Borough and Commissioner Kris died before these proceedings were instituted.

The attorney for plaintiff testified that plaintiff requested him to take an application for a furlough. The rules and regulations of the board provide that the board may for good and sufficient cause grant to any member of the fire department a furlough or leave of absence from duty for a period not exceeding one year. There was no evidence that the commissioners ever granted plaintiff a furlough or leave of absence from duty.

There was a suggestion in the testimony of Joseph Colenzi, appointed as Acting Chief on April 15, 1931, that plaintiff

the department, that plaintiff was angry and left the department in some temper. There was abundant evidence by the commissioners that they never saw plaintiff after that time until the trial of this case, and that after April, 1931, he performed no services as a member of the fire department. There was no application to the board for a furlough for plaintiff and no question concerning him came up in any of the meetings. Plaintiff claims that he suffered a nervous breakdown but the doctor who treated him testified that while he suffered from nervousness it was not a nervous breakdown; that he treated plaintiff for rheumatism. It also appears that in December, 1933, and January, February and March, 1934, plaintiff was employed in the capacity of a foreman, supervising about twenty-five laborers in a "W. P. A." project in Berwyn.

From the time plaintiff left the Berwyn fire department, April 15, 1931, he never thereafter resumed any duty as a member of the department. It was not until May 17, 1935, that he served a written notice upon the commission seeking restoration to his position. Under these circumstances the conclusion is irresistible that plaintiff voluntarily abandoned his employment with the fire department in April, 1931.

The claim that plaintiff was granted leave of absence by the mayor and a commissioner, who have since died, will have no weight against the plain requirement that such furloughs can be granted only by official action of the board. It was held in People ex rel. Reilly v. Kankakee, 288 Ill. App. 192, 202, that such official action can be taken by the board of fire and police commissioners only at an official meeting of the board, and its records are the only lawful evidence of its action. To the same effect is The People v. Chicago & E. I. Ry. Co., 306 Ill., 402, 412. Plaintiff failed to prove that he ever applied for or received any official furlough from the board and must therefore be deemed to have abandoned

his position.

Plaintiff was guilty of laches. His four years delay before seeking any redress from the board is not satisfactorily explained. Kenneally v. City of Chicago, 220 Ill. 485, 503-04.

For the foregoing reasons the judgment order and decree of the Circuit court awarding the writ is reversed.

REVERSED.

O'Connor, P. J., and Matchett, J., concur.

4

40074

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,
Appellee,

vs.

SOL RUBIN et al. (MAURICE R. UNION, Appellant.)

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

294 I.A. 615

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a foreclosure decree entered after reference to a master, finding there was due plaintiff $204,476.25 with interest; the appeal is by Maurice R. Union, claiming an interest in the property prior and paramount to the interest of plaintiff.

September 29, 1933, the Metropolitan Life Insurance Company, plaintiff, filed its bill of complaint seeking to foreclose a trust deed made to it on June 1, 1929, by Sol Rubin and his wife, conveying certain real estate in Cook county to secure their note for $125,000. The bill alleged default in payment of principal, interest, taxes, etc.; a decree was entered finding that the allegations of the bill were proven and that plaintiff was entitled to a sale of the property.

Defendant Maurice R. Union appealed directly to the Supreme court and that court held that there was no reason why it should take jurisdiction of the appeal and transferred the cause to this court. (367 Ill. 636.)

The bill alleges, among other things, that on January 26, 1927, a judgment was rendered in the Municipal court of Chicago in favor of Hawkins & Loomis Company against Sol Rubin for $1000; that on January 30, 1929, the records of the Municipal court recited that this judgment had been satisfied of record on January 30, 1929; that this was the state of the record when the mortgage

METROPOLITAN LIFE INSURANCE COMPANY,)
a Corporation,)
Appellee,)
)
vs.)
)
BEN RUBIN et al. (MAURICE B.)
UNION, Appellant.))

MR. JUSTICE MOSKOWITZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a determination before entered after reference to a master, finding there was due plaintiff $[illegible].25 with interest; the appeal is by Maurice H. Union, claiming an interest in the property prior and paramount to the interest of plaintiff.

September 30, 1936, the Metropolitan Life Insurance Company, plaintiff, filed its bill of complaint seeking to foreclose a trust deed made to it on June 1, 1928, by Ben Rubin and his wife, conveying certain real estate in Cook county to secure their note for $125,000. The bill alleged default in payment of principal, interest, taxes, etc.; a decree was entered finding that the allegations of the bill were proven and that plaintiff was entitled to a sale of the property.

Defendant Maurice H. Union appealed directly to the supreme court and that court held that, there was no freehold title to this court. (357 Ill. 636.)

The bill alleges, among other things, that on December 30, 1927, a judgment was rendered in the Municipal Court of Chicago in favor of Carolina & Loretta Company against Ben Rubin for $1000; that on January 30, 1928, the records of the Municipal court recited that said judgment was then satisfied of record on January 30, 1928; that this was the state of the record when the mortgage

to plaintiff was made and recorded; that subsequently, on April 11, 1930, a motion was made by the Hawkins & Loomis Company to strike the satisfaction piece from the files; February 11, 1931, a Municipal court Judge sustained this motion and the satisfaction piece was ordered stricken; January 15, 1932, defendant Sol Rubin made a motion to vacate the order entered February 11, which was sustained; another motion was made by the judgment creditor to strike the satisfaction piece and on February 1, 1932, this motion was sustained and the satisfaction piece ordered stricken; an appeal was prayed from this order but never perfected.

The bill further alleges that on December 24, 1931, an execution was issued out of the Municipal court under which the bailiff levied on the premises in question, and on March 2, 1932, pursuant to the execution and levy, purported to sell the premises to the Hawkins & Loomis Company for $1320.04, and a certificate of sale was issued to the purchaser and a copy filed for record in the recorder's office.

The bill further alleges that Maxwell Rubin, acting for his father, Sol Rubin, entered into negotiations with the Hawkins & Loomis Company to purchase the certificate, which was done and the certificate assigned in blank at the request of Maxwell Rubin. The bill alleges that the consideration for the assignment was paid by Maxwell Rubin on behalf of his father; that thereafter, on September 16, 1933, the bailiff of the Municipal court issued his deed of the premises to defendant Maurice R. Union, which was filed for record. The bill alleges that Union took the deed on behalf of Sol Rubin, who was the real owner and in actual possession of the premises, and that, as the bailiff's certificate of sale and deed has been acquired for and on behalf of Sol Rubin, the mortgagor, the rights, if any, under the certificate and deed were subject and subordinate to the lien of plaintiff's trust deed.

Both Sol Rubin and his wife and also defendant Union filed answers denying that Sol Rubin owned the premises and asserting that Union was the owner in fee simple.

The master, who heard the evidence, found that Union is a cousin of Sol Rubin's wife and an old friend of the family; that his residence is in Cleveland, Ohio; that Union acted and took title to the premises for the use and benefit of Sol Rubin, the mortgagor, and that the interest acquired by Union is subject to the prior lien sought to be foreclosed.

Without detailing the testimony at length, we are of the opinion the evidence amply justified the master in his conclusion. Union testified that he was visiting the family of Sol Rubin and was told by Maxwell Rubin, who is an attorney and the son of Sol Rubin, that Sol was about to lose the building in question and that it would be a good opportunity for Union to invest $1000 in the purchase of the certificate; that upon his return to Cleveland he withdrew the cash from his safety deposit box, carried it with him to Chicago and delivered it to Maxwell Rubin.

Maxwell Rubin testified that he took Union's money, procured a cashier's check, which he delivered to one of the attorneys for Hawkins & Loomis Company and received from him the certificate of sale with an assignment in blank.

Mr. Donald M. Schaffer, one of the attorneys representing Hawkins & Loomis Company, which had the judgment against Sol Rubin, testified that he had negotiations with Maxwell Rubin, who purported to be acting on behalf of his father, Sol; that finally the amount to be paid was agreed on and the certificate assigned, but at the request of Maxwell Rubin, Sol Rubin's name was not written in the certificate. The reason given was that there were other judgments against him. Mr. Schaffer never heard the name of Maurice Union mentioned during these negotiations.

Both Sol Rubin and his wife and also defendant Union Title answers denying that Sol Rubin owned the premises and asserting that Union was the owner in fee simple.

The master, who heard the evidence, found that Union is a cousin of Sol Rubin's wife and an old friend of the family; that his residence is in Cleveland, Ohio; that Union acted and took title to the premises for the use and benefit of Sol Rubin, the mortgagor, and that the interest acquired by Union is subject to the prior lien sought to be foreclosed.

Without detailing the testimony at length, we are of the opinion the evidence amply justified the master in his conclusion. Union testified that he was visiting the family of Sol Rubin and was told by Maxwell Rubin, who is an attorney and the son of Sol Rubin, that Sol was about to lose the building in question and that it would be a good opportunity for Union to invest $1000 in the purchase of the certificate; that upon his return to Cleveland he withdrew the cash from his safety deposit box, carried it with him to Chicago and delivered it to Maxwell Rubin.

Maxwell Rubin testified that he took Union's money, procured a cashier's check, which he delivered to one of the attorneys for Hawkins & Loomis Company and received from him the certificate of sale with an assignment in blank.

Mr. Donald K. Swartz, one of the attorneys representing Hawkins & Loomis Company, which had the judgment against Sol Rubin, testified that he had negotiations with Maxwell Rubin, who purported to be acting on behalf of his father, Sol; that finally the amount to be paid was agreed on and the certificate assigned, but at the request of Maxwell Rubin, Sol Rubin's name was not written in the certificate. The reason given was that there were other judgments against him. Mr. Swartz never heard the name of Maurice Union mentioned during these negotiations.

A convincing bit of evidence was developed showing that Sol Rubin continuously claimed to be the owner of the premises. Sol Rubin had executed a second mortgage trust deed to Charles O. Fetscher, as trustee, to secure the principal note of $5700; April 5, 1933, a bill was filed in the Circuit court of Cook county in the name of Fetscher, trustee, against Sol Rubin to foreclose this second mortgage; Jay I. Rosenberg signed the complaint as the plaintiff's attorney.

Mr. Fetscher testified before the master in the instant case that he did not know Rosenberg, did not know the suit had been filed and had not authorized anyone to file such a suit; that the trust deed and notes were never out of the possession of the Mortgage company which owned the papers, except that Sol Rubin had been allowed to take the trust deed for a short time for the purpose of having a photostatic copy made of it.

Rosenberg testified that Sol Rubin had engaged him to file this bill to foreclose the second mortgage; that Sol Rubin had furnished him with the necessary funds to pay the costs, and that he had obtained the information necessary for the preparation of the bill from Sol Rubin. It also appears that a receiver was appointed in this second mortgage foreclosure, and that Maxwell Rubin dictated to a stenographer the bill of complaint to foreclose the second mortgage.

It is obvious that this second mortgage foreclosure proceeding was carried on for the benefit of Sol Rubin. There is no evidence that Union knew anything about these proceedings and the appointment of a receiver.

From these and other circumstances in evidence we are of the opinion that the chancellor properly approved the finding of the master to the effect that Maurice R. Union had no interest in the

property; that his actions in the matter were solely on behalf of and for the benefit of Sol Rubin. Other points are made which it is unnecessary to consider.

Sol Rubin being the owner of the premises in question, all his rights are subject to the trust deed sought to be foreclosed. The decree so found and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

property; that the actions in the matter were solely on behalf of and for the benefit of Dot Rubin. Other points are dealt with if necessary to consider.

Dot Rubin being the owner of the premises in question, all his rights are subject to the same legal rights to be exercised. The decree so found and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Patterson, J., concur.

39696

LILLIAN C. GARDNER, As Executrix, etc., et al.,
Appellants,
vs.
CITY OF CHICAGO, a Municipal Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 615

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case for alleged damages to plaintiffs' real estate from the construction of a certain local improvement and upon trial by jury there was a verdict for defendant on which judgment was entered and plaintiffs appeal. The amount of damages demanded was $250,000.

The land in question is known as the "Gardner" tract; it consists of about seven acres of ground - 290,361 square feet; it is situated directly east of North Robey street (now known as Damen avenue), is south and west of the North branch of the Chicago river, and north and east of Fullerton and Elston avenues in Chicago. The property is used for industrial purposes. Two tracts of land (one owned by the Lister family, on which a glue factory has been operated; the other owned by the United States Brewing Company) lie adjacent west of Damen avenue. Prior to the construction of the improvement of which plaintiff complains the City, pursuant to an ordinance, instituted in the Superior court a condemnation proceeding for the acquisition of land necessary for the extension of North Robey street (now known as North Damen avenue) from Fullerton avenue north to the Chicago river and beyond the river to Diversey boulevard. A judgment was rendered in the condemnation proceeding, awarding compensation. In the same suit (on December 15, 1926) an assessment was levied against the remainder of the Gardners' property for benefits found to be conferred by the opening up of the new street. This proceeding

WILLIAM C. [illegible], As Executrix,
etc., et al.,
Appellants,
vs.
CITY OF CHICAGO, a municipal
Corporation,
Appellee.

294 I.A. 615

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in the case for [illegible] damages to plaintiff's real estate from the construction of a certain [illegible] and upon trial by jury there was a special [illegible] ment was entered and plaintiffs appeal.. [illegible] demanded $250,000.

The land in question is known as the "Harvard" tract; it consists of about seven acres of ground - 280,000 square feet; it is situated directly west of North Kenny street (one block [illegible] avenue), it south and west of the north branch of the Chicago river, and north and east of Pulaski and Elston avenues in Chicago. The property is used for industrial purposes. Two tracts or land [illegible] owned by the Lieber Family, of which a [illegible] the other owned by the United States Trucking Company) lie adjacent west of Damen avenue. Prior to the construction of the improvement of which plaintiff complains the City, pursuant to an ordinance, instituted in the Superior court a condemnation proceeding for the acquisition of land necessary for the extension of North Kenny street (now known as North Damen avenue) from [illegible] south to the Chicago river and beyond the river to Diversey boulevard. A judgment was rendered in the condemnation proceeding [illegible].

In the case at bar (on December 13, 1926) we dismissed the writs against the remainder of the Harvard property for [illegible] to be enlarged by the opening up of the new street. This proceeding

was pursuant to the provisions of the Local Improvement Act (Smith Hurd Ill. Rev. Stats., 1925, ch. 24, par. 713-728). (Ill. State Bar Stats. 1937, chap. 24, pars. 711-730, pp. 524-527.) Pursuant to the provisions of a later ordinance the City of Chicago proceeded to improve N. Robey street by the construction of a bridge over the North branch of the Chicago river and a viaduct immediately north of it. The award in the condemnation case was entered December 15, 1926. The construction of the viaduct or bridge and the approach thereto was begun about six months later, on July 1, 1927. The approach to the bridge was constructed northward on North Robey street from Fullerton avenue and on the right of way acquired in the condemnation suit. In the proceeding under the Local Improvement Act for assessment of benefits, the court found that there was no benefit to the Gardner property by reason of the construction of the improvement and therefore canceled the assessment which the commissioners had reported against the property. In that proceeding the court had no jurisdiction to determine the amount of damages. The finding that there was no benefit and the cancelation of the assessment laid in the special assessment proceeding determined only the issue of the benefits and left the door open for the beginning of this suit which followed.

The construction of the N. Robey street improvement was begun July 1, 1927, and completed on January 1, 1929. The improvement extended more than 700 feet along the western boundary of the Gardner property and extends northward from the intersection of the central line of N. Robey street with the northeast line of Elston avenue. For 65 feet the street as improved is at grade with plaintiffs' property; at that point it rises on a 1% grade for 239 feet. This elevation is conceded to be inconsequential. At the end of this 239 feet the improvement is laid on a 3½% grade for 448½ feet; at that point it rises to meet the level of the bridge. The highest elevation of

improvement

the improvement is 33.19 feet above city datum at the bridge. This is 21 feet above the grade of plaintiffs' property. The entire improvement was erected on the land to which title had been taken by the City through the condemnation proceeding. Along the northwest part of the Gardner property for approximately 300 feet the improvement as constructed left a space of about 8 feet between the eastern edge of the improvement and the property. Gardners used the land for industrial purposes, and have conducted a planing mill on it. It was for a time served by two Northwestern Railway switch tracks, one extending from the Milwaukee division and coming across Fullerton avenue entering the property at the southeast corner; the other from the Wisconsin division entered this property at the northwest corner. The Wisconsin division switch track was cut off by the improvement. Expert evidence was given in behalf of plaintiffs to the effect that the construction of the improvement damaged the buildings alone in the amount of $60,000 and that the real estate, as a result of the improvement, had declined in value more than $80,000. On the other hand experts for the City testified that the improvement had not damaged but on the contrary increased the value of the property of plaintiffs about 25%.

It is contended by defendant the judgment should be reversed for the reason that the condemnation proceedings by which the City obtained title to the property upon which the improvement was constructed was unfairly injected into the controversy in a manner which confused the jury; because the court erred in allowing witnesses for defendant to testify to the benefits resulting to the premises on account of the construction of the improvement; because the court erred in excluding from evidence two letters written to the City of Chicago by the owner of the property on May 14, 1927; because the evidence shows that, as it is claimed, plaintiffs' property was damaged by the loss of switch track facilities; because the attorney for defend-

ant in his argument unfairly appealed to the passion and prejudices of the jury, and finally for the reason, as it is said, that the verdict and the judgment deprived plaintiffs of their property without compensation, in violation of the constitution of Illinois and of the United States.

Plaintiffs contend that the condemnation proceeding was dehors the case on trial and that it was erroneously brought into the proceeding. This came about as the result of testimony given in behalf of plaintiffs by witness Otto Scharmer. He testified he had been a tenant of the property from 1910 to 1922, and was familiar with the property before and after the condemnation and improvement were completed; that the building and the industry lost value as far as construction and mill work were concerned because of the difficulty resulting in handling long pieces of timber - pieces from 60 to 80 feet long; that on the property as it now is it is a tough drag to drag out 60 foot lumber on a straight drive, and that making a right angle swing with pieces 60 to 80 feet long is very difficult and almost impossible, that "you can't pull out with an 80 to 100 foot timber now since the building of the bridge approach, but it could be done before."

No objection was made to this testimony when given but at the close of plaintiffs' evidence the attorney for defendant moved to strike out Scharmer's testimony that the buildings had been damaged by reason of the fact that long logs could not be maneuvered as formerly. Defendant's attorney said Scharmer's testimony showed that the reason they could not maneuver large timbers was because the distance to the building was cut down by the new street and by the taking of the property. The court remarked that, "It was an element of damage, if any, in the condemnation proceeding, but they were compensated for the land taken in that proceeding." Mr. Bishop, attorney for plaintiffs, then said:

"May I suggest that any part of that testimony-- that you have written up, and you call his Honor's attention to that particular part. I think your contention is wrong on that point. I think if we can spend a few minutes in chambers I can call attention to that particular part.

The Court: He testified about the swinging of these long pieces of timber. He said that the long pieces of timber had to be taken around the other way because of the inability now to turn them about. There wasn't room between the structure and the building, and he had in mind at that time the land before the condemnation proceeding wherein the land was taken and the owners of that land compensated by the city in that proceeding. They have to deal with the land as left to them, as a result of the condemnation proceeding, not this proceeding. Whether there would be a viaduct there, or anything else, the same rule would apply to any evidence as to inability to turn the lumber around because of the viaduct approach, which is inadmissible and I will sustain the motion to strike in regard to that when we come to the particular parts of the testimony."

Plaintiffs' attorney interposed no objection to this ruling, which was made in chambers and out of the presence of the jury. The following day the court made this statement to the jury:

"The Court: Gentlemen of the jury: There was a witness who testified here yesterday by the name of Scharmer. In your absence, while you were not here, part of his testimony was ruled out. Part of the testimony that the court ruled out wastestimony about his ability on the land remaining to remove long logs and so forth. That is not part of the law suit. The question of the taking of the land is disposed of in another lawsuit, and the amount allowed plaintiffs in this proceeding, for his land, was determined in that so-called condemnation proceeding. The allowance in that proceeding was to compensate him for such taking of the land and limiting his operations with the remainder of the land. Hence, that evidence as to the maneuvering of the long lumber about there, because of the construction of this ramp, is not in this case.

Mr. Bishop: To which the plaintiffs take an exception.

The Court: To the ruling out of the evidence?

Mr. Bishop: Yes.

The Court: Not to my statement now of fact?

Mr. Bishop: Yes, to the statement also.

The Court: I regret, but I thought we talked it over, and I thought it was understood that I was to tell the jury. I am sorry."

Plaintiffs contend this statement was prejudicial because it came from the court himself; because it singled out a part of the testimony of a witness after the witness had left the stand and there was no possibility of curing the defect; because it came with dramatic suddenness at the conclusion of the evidence. Plaintiffs say the record does not show that this ruling was by agreement. It is true that it does not show an express agreement but the sug-

gestion that the matter should be considered in chambers and the intimation that there might be an agreement that certain parts of the evidence should go out were made by the attorney for plaintiffs. In chambers he made no objection to the ruling of the court that the evidence would be excluded or the statement of the court that the jury would be so informed. The evidence as to alleged damages with reference to the maneuvering of the long timbers was incompetent since it was based upon the condition of the premises prior to the time plaintiffs' land was taken under the condemnation proceeding. The court was justified in believing that the attorney for plaintiffs had consented to the exclusion of the evidence and that a statement to that effect might be made to the jury. Moreover, his objection when the statement was made was general in its nature. There was no attempt to state the ground upon which it was based nor request that the witness might be produced for further explanation. Defendant offered in evidence the record of the proceedings in the condemnation case. Plaintiffs objected and upon their objection it was excluded. If the evidence of Scharmer as to the maneuvering of the logs was to stand, then this evidence was competent for the purpose of showing it to be a fact, as the court stated, that damages for taking the land had been disposed of in the condemnation proceeding. The plaintiffs cite Green v. City of Chicago, 97 Ill. 370, to the proposition that supposable benefits or damage that may result to adjacent property by reason of a proposed improvement for which such property is taken may not be regarded in determining the amount of damages. That rule is not applicable in this case because the condemnation proceeding was under the Local Improvement act, in which both the damages and the benefits to land taken as well as land damaged was necessarily considered litigated and adjudicated. Illinois State Bar Stats. 1937, chap. 24, pars. 711-730, p. 524-527. (Smith Hurd Ill. Rev. Stats. 1925, ch. 24, secs. 15 and 30, pars. 713-728.)

We do not think there was any error in the ruling of the court or the statement made by the court under the circumstances. If there was it was invited by plaintiffs' attorney through the suggestion that he would agree to part of the evidence going out if it might be discussed in chambers; by his failure to object to the ruling of the court when made in chambers; by his failure to object specifically and point out the matters of which he complained when the statement was made by the court. The error was also invited by his objection to the offer of the record in the condemnation suit which was excluded by the court upon his objection. The statement to the jury concerning Scharmer's testimony was made necessary by that ruling obtained by plaintiffs' attorney. There was no reversible error in the statement by the court under these circumstances.

Defendant upon the hearing offered evidence tending to show the benefits plaintiffs' property derived from the improvement as made. This testimony was objected to by plaintiffs and the objection was overruled by the court. It was agreed that the same objection might stand as to testimony of all defendant's witnesses who so testified. The objection of plaintiffs as stated was that in the special assessment proceeding to assess benefits for the construction of the improvement it had been decided that there were no benefits to the property of plaintiffs and the assessment which had been made against it was cancelled. Plaintiffs' contention is that the matter thereupon became res adjudicata, and that proof tending to show benefits as a result of the improvement was therefore inadmissible. Plaintiffs cite a large number of cases, such as Hanna et al. v. Read et al. 102 Ill. 596; Chicago Title & Trust Co. v. The National Storage Co., 260 Ill. 485; LeMoyne v. City of Chicago, 175 Ill. 356, and many other cases stating the general proposition that where an issue between the same parties has been litigated in a former proceeding and adjudicated, the parties are thereafter bound by the former judgment.

That such is the general rule is not questioned, but that rule is not to be applied to facts such as are presented by this record. The issue in this special assessment proceeding was between the same parties but the issue there presented was not identical with the issue here. It is not defendant's contention that by reason of the improvement the fair cash market value of the property of plaintiffs was increased. That was the issue in the special assessment proceeding, but it is not the issue in this suit. The issue in the present litigation is whether the damages and detriments to plaintiffs' property are equal to or greater than the advantages which resulted to it from the improvement. If the advantages or benefits are equal to or greater than the detriments or damage which resulted to the premises from the improvement, then the improvement did not decrease the fair cash market value of the property and plaintiffs have not sustained legal damages such as is claimed in their declaration. Notwithstanding the finding in the special assessment proceeding, therefore, this evidence was admissible to determine the ultimate issue which had not been determined in the prior proceeding. This court has so held in the recent case of Cuneo v. City of Chicago, 292 Ill. App. 235, in which leave to appeal was denied by the Supreme court on February 14, 1938, (No. 24533) thus making the opinion final. In City of Batavia v. Wiley, 342 Ill. 384, the Supreme court has declared that "benefits are measured by the appreciation of the fair cash market value of the property due to the improvement." This is the rule stated in Fahnestock v. City of Peoria, 171 Ill. 454; City of Lincoln v. Chicago & A. R. Co., 262 Ill., 11, and such is the rule adhered to by this court in the Cuneo case. The plaintiffs undertake to question certain cases cited in the opinion in the Cuneo case; namely, City of Chicago v. Clark, 233 Ill. 404, and People v. City of St. Louis, 367 Ill. 57, and point out circumstances distinguishing those cases from the Cuneo case and this case. While there are respects in which

they differ, the reasoning of those cases is applicable and the reasoning of the Cuneo case is not, it is believed, subject to valid criticism. The ultimate question to be determined in a case of this character is whether the fair cash market value of the property is less after the improvement is completed than it was before its completion. That price must be determined by a consideration of the advantages as well as the detriments resulting from the improvement. It is usually true that any local improvement involves both detriments and advantages to adjoining property. If the advantages are not greater than the detriments a purchaser would not pay more for the property and its fair cash market value would therefore not be increased and it could not be said to be benefitted by the improvement. If, on the other hand, the advantages created by the improvement are greater than the detriments resulting from it, a purchaser would pay more for the property and its fair cash market value would therefore be increased and the property could be said to be benefited thereby. A judgment in the special assessment proceeding to the effect that the property was not benefited (meaning, of course, that its fair cash market value was not increased) did not necessarily mean more than that the advantages did not exceed the detriments. It was not at all determinative of the further question of whether the detriments exceeded the advantages, and that, as defendant well points out, is the precise issue in the instant case. For aught that was determined in the special assessment proceeding the advantages and the detriments to the property from this improvement may be evenly balanced. If so, the City is not liable in this action. The issues were not identical. The judgment in the special proceeding was, therefore, not res adjudicata. The cases cited by plaintiffs as to res adjudicata and estoppel by verdict or judgment are not in point. We hold the evidence was admissible. As defendant says, any other rule would open the door to frauds upon the

public in proceedings of this character. There was no error in the admission of this evidence.

The letters of May 14, 1927, which it is complained were excluded, were written in the lifetime of Mr. Gardner, the then owner, to Michael J. Faherty, predident of the Board of Local Improvements of Chicago. It was not denied that these letters were received, and while the originals could not be produced, carbon copies were available and evidence warranting their admission was received in case they were material and admissible. The evident purpose in offering the letters was to show that Mr. Gardner desired to retain the use of one of the switch tracks by which his property had been served. The railroad to which this switch track connected the property of plaintiffs was a half-mile distant. This switch track was laid over the land of private owners and its construction and maintenance had been arranged for by these owners, the United States Brewing Company and the Lister family. In order to bring the switch track to their property these owners expended (as the evidence shows) $35,000; they also provided the land necessary to accommodate the switch track and also a storage track which the railroad insisted should be constructed. Neither the Listers nor the Brewing company ever made any arrangements with the plaintiffs or anyone else for the use of these switch tracks. The contract between the railroad company and Listers provided that no one should use the switch unless he participated in its cost and maintenance. Both these private owners desired that anybody who wanted service should bear their proportionate share of expenses. Negotiations were opened looking toward arrangements with plaintiffs whereby they might acquire the right to use and undertake to bear their part of the expenses. The negotiations failed; no arrangements were made. Nevertheless plaintiffs placed a track upon their property and proceeded to connect it with the track running over the lands of adjoining owners. The tracks constructed by plain-

tiffs were of a flimsy nature - tracks in which the ties rested on the ground and the top rails were about a foot off the natural surface. There was testimony (undenied) to the effect that plaintiffs succeeded in getting the service over this track only in the night time without the knowledge of the private owners. The Brewing company thereupon caused a portion of its track to be taken up to prevent this surreptitious use. When the construction of the Robey street viaduct was begun negotiations were again opened with a view to having the City change the plans so as to eliminate the solid fill and provide a trestle where the switch track might cross N. Robey street. The negotiations were for the purpose of permitting the tracks to be maintained so as to serve plaintiffs if they would agree to pay their share of the expense. This change was not made. Under the uncontradicted evidence plaintiffs had no right to use the switch track in question. The exclusion of letters with relation thereto was not erroneous.

It is urged that the court erred in refusing to instruct the jury as requested that in determining the value of plaintiffs' property the jury was entitled to take into consideration the possibility or impossibility of securing switch track facilities. Complaint is also made of the refusal to give plaintiffs' instruction No. 9, by which plaintiffs requested the court to tell the jury that under the law in this state railroad companies are required, upon application of a shipper or receiver, or contemplated shipper or receiver of freight, to furnish switches and tracks for a connection between the railroad of such railroad company and any existing or contemplated track of the applicant, if such connection is reasonably practicable, will not materially increase the hazard of the operation of the railroad, and if the business which may reasonably be expected over such connection will justify the expense thereof. Plaintiffs call attention to the statute (Jones Ill. Statutes Annotated, 112,065, sec. 45,

and South Park Comrs. v. Ayer, 237 Ill. 211, C. & W. I. R. R. Co. v. Heidenreich, 254 Ill. 231) and contend that under the statute and these cases the refusal to give this instruction was error. There were two switch tracks upon plaintiffs' property. The only one it was ever entitled to use is still there. The improvement made did not affect or disturb it in any way. The only track the improvement shut off was a track the plaintiffs were never entitled to use. We think damages by reason of being deprived of the use of a switch track they had no right to use was merely speculative and conjectural. There was no error in refusing these instructions.

Plaintiffs also contend that defendant in its argument to the jury appealed to passion and prejudice. The remarks of which complaint is made are in part as follows:

"Now, I appreciate your patience, gentlemen - I appreciate your courtesy and patience throughout this entire trial, but in considering this case I want you to consider one thing, and that is what is the interest or lack of interest of the parties in this case. The plaintiffs are here seeking, represented by a lawyer hoping to get a fee out of this case. On the other hand, what has the City of Chicago got to be gained---
Mr. Bishop: I object to that line of argument.
The Court: Sustained.
Mr. McCarthy: It isn't my duty to come here and try to defeat a taxpayer. It is my duty---
Mr. Bishop: I object to what counsel's duty is.
The Court: Sustained."

We have read the argument of the opposing counsel. The statements of attorney for defendant while subject to criticism were not unprovoked. The objections thereto were sustained by the court. Some allowance in these matters must be made for the zeal of a lawyer for his client. There is nothing here that should require another trial of this case. Upon oral argument it was conceded (although the record does not show) that this case has been three times submitted to a jury; that once the jury disagreed and twice have returned a verdict for the defendant. We find no trespass upon the constitutional rights of plaintiffs, either under the Constitution of Illinois or

and South Park Comrs. v. Ayer, 237 Ill. 211, 5 A.L.R. 1, 86 N. E. 20. v. Morrison, 264 Ill. 231) and contend that under the evidence and these cases the refusal to give this instruction was error. There were two switch tracks upon plaintiff's property. One only one it was ever installed to use is still there. The improvement made did not affect or disturb it in any way. The only track the improvement shut off was a track the plaintiffs were never utilized by use. We think damages by reason of being deprived of the use of a switch track they had no right to use was merely speculative and conjectural. There was no error in refusing these instructions.

Plaintiffs also contend that defendant in its argument to the jury appealed to passion and prejudice. The remarks of which complaint is made are in part as follows:

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>
> The Court: Sustained."

We have read the argument of the speaking counsel. The statements of attorney for defendant quite subject to criticism were not unprovoked. The objections stated have increased in the mouth. Some allowance in these matters must be made for the zeal of a lawyer for his client. There is nothing here that would require another trial of this case. Upon oral argument to see counsel (although the record does not show) that this case has been tried three times submitted to a jury; that once the jury disagreed and twice have returned a verdict for the defendant. We find no grounds upon which rights of plaintiffs, either under the Constitution of Illinois or

that of the United States. Plaintiffs have presented their claims for damages to three juries. There should be an end to litigation sometime or somewhere.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

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for damages to three juries. There should be no end to litigation
sometime or somewhere.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Kennedy, J., concur.

39892

B. J. DOLAN, as Successor Trustee, etc., Plaintiff,

vs.

RUBIN MORENSKY et al., Defendants.

E. R. BURNETT, as Successor Trustee, etc., Petitioner, and L. H. HEYMANN et al., Bondholders Committee, Defendants,

Appellants,

vs.

PETER B. CAREY et al., Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 615

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is one of eight cases in which the material facts are similar and the issues of law identical. In each case the owner of certain premises executed a trust deed conveying land in Cook county, Illinois, to secure the payment of an indebtedness represented by certain bonds and coupons. In each of these instances the West Side Trust & Savings Bank, a banking corporation, was named as trustee. In each case the Bank appears to have been the issuer of the bonds, owned a considerable number of them and sold many of the bonds to its customers and depositors. In each default was made in payment of the bonds and in the conditions named in the trust deed. In each of them more than a majority of the owners in amount of the bonds secured by the trust deed entered into a written agreement on September 30, 1931, whereby L. H. Heymann, John P. Hooker, Henry Isaacs, Nelson Morris and Bertram M. Winston were designated a Bondholders Committee for the purpose of conserving the interests of the owners of the bonds. The agreement is a written document consisting of 9 articles with

D. J. DOLAN, as Successor Trustee, etc.,
Plaintiff,

vs.

RUBIN MORENSEY et al.,
Defendants.

R. R. BURNETT, as Successor Trustee,
etc., Petitioner, vs. E. ENGLER
et al., Bondholders Committee,
Defendants,
Appellants,

vs.

PETER B. CAREY et al.,
Appellees.

294 I.A. 615

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT:

many subdivisions and covering 48 pages of the abstract. The specific provisions of this agreement we shall hereafter notice. It was in substance an agreement whereby the owners of the bonds transferred the legal and equitable ownership thereof to the Bondholders' Committee and deposited the bonds with the West Side Trust & Savings Bank, therein named as depositary.

In each case the West Side Trust & Savings Bank, upon default, filed a bill to foreclose which is still pending. The rights of this committee have been challenged and sustained by this court in a number of cases. (In re Petition of Wm. L.O'Connell, 282 Ill. App. 146; People v. West Side Trust & Savings Bank, 280,, Ill. App. 308; and by the Supreme court in 362 Ill. 607.)

December 19, 1933, the Auditor of Public Accounts took possession of the West Side Trust & Savings Bank, and January 12, 1934, William L. O'Connell was appointed receiver of it. June 1, 1936, O'Connell on behalf of the Bank resigned the trusteeship by an instrument in writing which was recorded. Within 30 days thereafter a majority of the bondholders, as represented by the Bondholders' Committee, executed and recorded a written instrument appointing B. J. Dolan as successor trustee, Dolan accepting by a written instrument which was also recorded in Cook county. January 19, 1937, Dolan, upon his own petition, was substituted as plaintiff in each of the cases. He was granted leave to file amendments, which he did, making the West Side Trust & Savings Bank and Bondholders' Committee additional parties defendant to the cause. Dolan died May 6, 1937. Thereupon, within 30 days, the owners of a majority of the bonds represented by the Bondholders' Committee named E. R. Burnett as successor trustee by an instrument in writing, duly recorded, as was also the written acceptance of the trusteeship by Burnett. Thereupon Burnett filed his petition in each of the cases, praying that his appointment might be confirmed and he be substituted as plain-

many subdivisions and covering all parts of the district. The specific provisions of this agreement we shall hereafter notice. It was in substance an agreement whereby the owners of the bonds transferred the legal and equitable ownership thereof to the Bondholders' Committee and deposited the bonds with the First Side Trust & Savings Bank, therein named as depositary.

In every case the West Side Trust & Savings Bank, upon default, filed a bill to foreclose within the next month. The rights of this committee have been adjudicated and established by this court in a number of cases. (In re Petition of Wm. O'Donnell, 282 Ill. App. 140; Pennie v. First Side Trust & Savings Bank, 280 Ill. App. 208; and by the supreme court in 366 Ill. 607.)

December 12, 1932, the auditor of Public Accounts transmitted to the West Side Trust & Savings Bank, and December 12, 1934, William B. O'Connell was appointed receiver of it. June 1, 1936, O'Connell on behalf of the bank resigned the trusteeship by an instrument in writing which the record. Within 30 days thereafter a majority of the bondholders, as represented by the Bondholders' Committee, executed and recorded a written instrument appointing J. J. Dolan as successor trustee. Upon accepting by a written instrument which was also recorded in such county. January 19, 1937, Dolan, upon his own petition, was substituted as plaintiff in each of the cases. He was granted leave to file amendments, which he did, making the West Side Trust & Savings Bank and Independent Committee additional parties defendant to the cause. Solon filed May 6, 1937. Thereupon, within 30 days, the owners of a majority of the bonds represented by the Bondholders' Committee named a. a. Barnett as successor trustee by an instrument in writing, duly recorded, as was also the written acceptance of the trusteeship by Barnett. Thereupon Barnett filed his petition to each of the cases, praying that his appointment might be confirmed and he be substituted

tiff in the causes. He was given leave to file his petition and objectors ruled to answer, which in 6 of the cases they did, denying that he was duly chosen as trustee and denying that his appointment should be affirmed. The answers were filed May 17, 1937.

The causes were consolidated for hearing and September 16, 1937, a decree was entered finding Burnett predicated his right to be substituted as plaintiff by reason of his appointment as successor trustee by a Bondholders'/Committee (Protective) acting under a Depositary Agreement dated September 30, 1931; that the court was of the opinion that the agreement executed by the West Side Trust & Savings Bank had been abandoned by it as principal in the original agreement by virtue of its liquidation and receivership and the subsequent conduct of its receiver with respect to the Depositary agreement; that the Depositary agreement had been materially altered after its execution and the deposit of the bonds; that the agreement lacked mutuality in that it appears there was forbearance on the part of the depositing bondholders without any obligation on the part of the members of the committee to perform any duty; that the Depositary agreement provided that the Bank assumed liability to pay attorneys' fees, etc., and that this agreement was contrary to the declared public policy of the State, and, therefore, ultra vires in that it assumed to pay obligations which were not the obligations of the Bank. It was therefore decreed that the Depositary agreement of September 30, 1931, be declared to be null and void, any acts done or performed by the Bondholders' Committee thereunder be also declared null and void; that the appointment of any successor trustee made by it at any time and the appointment of E. R. Burnett as successor trustee be declared null and void, and that the same should be removed as a cloud upon the title of each of the parcels of real estate described in the several complaints; that the motion of Burnett to be substituted party plaintiff be denied, and further, that Peter B. Casey be appointed as

successor trustee with all the powers, rights and duties vested in the trustee by the deed of trust, and that such successor trustee be substituted as party plaintiff, and that Carey should be placed in possession of each parcel of real estate, and Burnett and any persons in possession of the respective premises be directed to deliver up possession to Carey and to turn over to him all funds belonging to the trust estate, together with leases, etc. In each of these cases Burnett and the Bondholders' Committee have appealed.

Section 3 of Article 5 of each of the trust deeds provides:

"In case the Trustee hereunder shall resign, be removed, or be dissolved, or otherwise become incapable of acting hereunder, a successor or successors may be appointed by the holder or holders of a majority in amount of the bonds then outstanding hereunder, by an instrument or concurrent instruments in writing duly signed by them and recorded in the Recorder's office of the county or counties wherein the mortgaged property is located; or in case said bondholder or holders shall not appoint a new trustee or trustees hereunder, as aforesaid, within thirty days after any such vacancy shall occur, then the holder or holders of any one or more of said bonds may apply to any court in the county or counties wherein said mortgaged property, or any part thereof is located, having general chancery jurisdiction, for the appointment of a new trustee hereunder, upon such notice to such person or persons as the court may direct, or upon such notice as shall be in accordance with the statute or the rules of such court."

Section 4 in substance provides that the successor trustee shall execute in writing and record his acceptance and thereupon, "without any further act, deed or conveyance, shall become fully vested with all the estate, properties, rights, powers, trusts, duties and obligations of its, his or their predecessor."

It was the theory of the Chancellor, and it is contended in support of the decree, that the Depositary agreement of September 30, 1931, was invalid, a nullity, and the appointment of Burnett thereunder therefore void. It is urged that this is true by reason of provisions contained in Article 2, section 3 of the agreement to the effect that certain items should be "paid or provided for" by the West Side Trust & Savings Bank of Chicago, should not be deducted from the proceeds unless the proceeds of the deposited mort-

gage obligations realized more than the amount of said obligations. The items covered by this section were compensation, if any, to the Bondholders' Committee, including therein fees and expenses of agents, appraisers and attorneys, as also attorneys employed for the purpose of conducting foreclosure suits, excluding, however, all fees and management expenses of the buildings, and including the fees of attorneys employed by the Bank to foreclose in cases where it was trustee, the fees of attorneys employed by others for the foreclosure of any other mortgage or trust deed to whose employment the Bondholders' Committee should have consented in a written instrument, the compensation of the depositary, the compensation of members of the Advisory committee, and the compensation as receiver of any officer or employee of the Bank appointed to act as receiver in connection with the foreclosure of the properties, as well as the fees of the attorneys of such receiver. This clause stated it was distinctly agreed that the Bank should not be liable to pay or advance sums for any items other than those specifically required, and that in addition to other items it should in no event be liable to pay or advance court costs or the compensation paid or allowed to any receiver other than its own officers or employees, or the expenses of property management and maintenance. Items of expense other than those specifically required to be provided for by the Bank should be deducted from the proceeds if definitely allocable to particular mortgage obligations. If it was not possible to so allocate them these expenses should be deducted from such deposited mortgage obligations as the Bondholders' Committee in its sole discretion should determine, and the depositor should have no personal liability with respect to any expenses or obligations incurred under the agreement except as provided in Section 3 of Article 5 in connection with the withdrawal of mortgage obligations from deposit.

It was also provided that in the event amounts realized from foreclosure in any case should exceed the amount necessary to pay the mortgage obligation in full, including principal and interest, the Bank would be entitled to be reimbursed for all advances made provided the depositing bondholders had secured the amount of their principal and interest. The objectors say that these promises were ultra vires the Bank and render the agreement null and void; that the promises are contrary to the declared public policy of the state; that banks may not use the depositors' money for purposes not within the scope of a banking business. They rely on Knass v. Madison-Kedzie State Bank, 354 Ill. 554, and Continental Illinois National Bank v. Peoples Trust and Savings Bank, 366 Ill. 377. They argue that the fact the Bank repurchased bonds contrary to the declared public policy of the state did not confer the right on the Bank to commit ultra vires acts by entering into the depositary agreement; that the objectors were not estopped to raise this defense by acceptance of the benefits, the agreement being wholly void. To this point they cite Awotin v. Atlas Exchange Bank, 295 U. S. 209. As a matter of fact, since the Bank is now insolvent its liability on an agreement to this effect becomes somewhat of a moot question. However, in view of its insolvency it appears that Mr. Nelson Morris, one of the Bondholders' Committee, has assumed the obligations of the Bank in this respect and agreed to bear the burden of these expenses. Also acting under another provision of the Depositary agreement, the Livestock National Bank has been named as the depositary of the bonds for the committee. For several reasons we think these contentions cannot be sustained.

In the first place this provision of the Depositary agreement was independent from other parts of it, and even if it were to be held ultra vires this would not make void the entire agreement. People v. Sherrard State Bank, 258 Ill. App. 168; 65 Corpus Juris, 333. In

the second place, we think under the circumstances appearing in evidence the agreement of the Bank (not that it would pay itself) but would cause these items to be paid was neither ultra vires nor against public policy. The facts here clearly distinguish this case from Knass v. Madison-Kedzie State Bank, 354 Ill. 554, and Continental Illinois National Bank v. Peoples Trust & Savings Bank, 366 Ill. 377, and Awotin v. Atlas Exchange Bank, 295 U. S. 209. In the Kedzie Bank case the plaintiff brought a bill in equity to compel the specific performance by a bank of its contract to repurchase real estate bonds according to the terms of the contract. In the course of its business the bank had sold these bonds and at the time of the sales had agreed to repurchase the bonds sold at any time after one year at 99 and after 3½ years at par. The bonds were not the obligations of the bank but were the obligations of other persons. It was held that this contract was void and against public policy as being in violation of an act for the protection of bank depositors approved June 4, 1879. (Ill. Revised Stats., 1937, chap. 38, sec. 64).

In the instant case the bank was the owner of a large portion of the bonds secured by these trust deeds. It was vitally important (default having been made in payment thereof) that these bondholders should act together for the conservation of their interests. If that object could not be attained, then dissipation of these assets was almost a certainty. It was not ultra vires the powers of the Bank to make any reasonable agreement looking toward the protection and preservation of its property. Zollman "Banks and Banking," vol. 1, p. 153, sec. 197. The distinction between the obligations here incurred and those assumed in the Knass case is vital and controlling. The suit there was in substance one for the specific performance of a particular contract which was held to be illegal and void as against public policy. This contract

on the contrary is not illegal, is not contrary to any public policy and is not immoral. There are well defined limits to the doctrine of ultra vires which must be kept in mind if justice is to prevail, otherwise the application of the doctrine might become a license for commercial piracy. The opposition of a small part of the bondholders to giving all of them protection which experience shows to be so much needed, is difficult to understand on any theory other than that set forth in Cohen v. Central Republic Trust Co., 282 Ill. App. 569, that the "litigation begets the client." We think, too, the agreement not being contrary to the provisions of public policy or in violation of any statute, the bondholders who have received and accepted the benefits of the services of the committee are on the clearest principles estopped from raising this defense, and this whether the depositary agreement is regarded as a trust agreement (which seems to have been the view of the court in Bullard v. City of Cisco, 290 U. S. 179) (or simply a contract) as seems to have been held in Habirshaw Electric Cable Co. v. Habirshaw Electric Cable Co., 296 Fed. 875.

The next contention of the objectors is that the Depositary agreement is void for want of mutuality. As sustaining this contention they point out that under section 4 of article 1 of the agreement the Bondholders' Committee might at its election return to a depositor any mortgage obligation which had been deposited with it by him and thereby terminate all rights which had accrued to him by reason of such deposit, and this even though other obligations of other depositors were retained by the committee. This provision, it is urged, destroyed all mutuality between the parties to the contract. The depositors (say they) were bound, while the committee was not bound, and such an agreement, they say, is void, citing Re: Estate of Faberson, 286 Ill. App. 424; Re: Lanquist,

70 Fed. (2d) 929; Higbie v. Rust, 211 Ill. 333; Joliet Bottling Co., v. Brewing Co., 254 Ill. 215.

If we regard the agreement as creating a trust the question of mutuality becomes immaterial. Bullard v. City of Cisco, 290 U.S. 179; Habirshaw Electric Cable Co. v. Habirshaw Electric Cable Co., 296 Fed. 875. However, we hold the agreement is not void for lack of mutuality. Thebest Laundry and Cleaning Co. v. Duffy, 293 Ill. App. , 1252. The agreement contemplated that many persons would become parties to it. The consideration for the deposit of bonds by one bondholder was the deposit by another bondholder of his bonds. The depositary agreement recites that united action and cooperation on the part of the holders of the mortgage obligations is advisable in order to protect the security and to enforce and procure payment of the interest and principal of the same and to protect the rights and interests of the holders thereof in all respects, and that such united action and cooperation can best be secured through a committee as provided in the agreement. The agreement says: "Whereas, the Bondholders' Committee has consented to represent and to act for the Depositors, as hereinafter set forth; Now, Therefore, in consideration of the premises and of the mutual advantages which will accrue to such Depositors, all Depositors, each for himself but not for the others or any of them, agree with one another, with the Bondholders' Committee, and with the Depositary hereinafter appointed as follows:" etc. Even if as originally drawn the agreement was subject to attack on the ground of want of consideration, in view of the long services of the committee, the litigation, etc., conducted by it in behalf of the bondholders, we think the bondholders who have accepted these services are now estopped on the plainest principles to argue that the contract is void for want of consideration or lack of mutuality. Moreover, an agreement is not necessarily void for want of mutuality.

70 Fed. (2d) 939; Higbie v. Mayo, 331 Ill. App. [illegible]; Dalton Adding Mach. Co. v. Prewitt Co., 154 Ill. App.

If we regard the agreement as creating a trust for the benefit of mutuality becomes immaterial. Holland v. City of Chgo., 290 U.S. 179; Babbitt-Am Electric Cable Co. v. Lightning Electric Cable Co., 296 Fed. 178. However, we hold the agreement is not void for lack of mutuality. Thebest Laundry and Cleaning Co. v. Darby, 301 Ill. App., 1939. The agreement contemplated that many persons would become parties to it. The consideration for the benefit of bonds by one bondholder was the benefit by another bondholder of his bonds. The depositary agreement recites that united action and cooperation on the part of the holders of the bonds is advisable in order to protect the security and to enforce the prompt payment of the interest and principal of the same and to protect the rights and interests of the holders thereof in all respects, and that such united action and cooperation can best be secured through a committee as provided in the agreement. The agreement says: "Whereas, the Bondholders' Committee has commenced by proceedings and to [illegible] the Depositors, as hereinafter set forth; now, therefore, in consideration of the premises and of the mutual advantages which will accrue to such Depositors, all Depositors, each for himself but not for the others or any of them, agree with one another, with the Bondholders' Committee, and with the depositary hereinafter appointed as follows:" etc. Even if it originally drawn the agreement was modified to create on the ground of want of consideration, in view of the long services of the committee the litigation, etc., evidenced by it in behalf of the bondholders, we think the consideration was adequate. Long services are not returned on the quantum petruleles in case that the contract is void for want of consideration or lack of mutuality. Moreover, an agreement is not unenforceable for lack of mutuality

Watford Oil and Gas Co., v. Shipman, 233 Ill. 9; Ulrey v. Keith, 237 Ill. 284; Poe v. Ulrey, 233 Ill. 56.

The contention is also made that the agreement was not binding for the reason that it was (after the failure of the Bank) materially altered. The Bondholders' Committee, after the insolvency of the West Side Trust & Savings Bank, named a new depositary for the bonds. The agreement provided for this but also declared that "each depositary should be vested with the powers and duties and obligations of the original depositary." It is true the new depositary (The Livestock National Bank) did not assume the expenses the West Side Trust & Savings Bank had obligated itself to pay. However, by arrangement Mr. Morris of the Committee assumed these responsibilities. Now it is argued this is a breach of the agreement by which the depositors are released from their obligations under the agreement, and that by reason of this alteration the agreement has become void. Even assuming this was such a material alteration as to make void the entire agreement (which we do not think it was), we are unable to understand upon what theory any depositor would have a right to raise the question except with reference to bonds owned and deposited by himself. In all these cases a majority in amount of the holders of the bonds are insisting on the validity of the depositary agreement and that it be carried out. The change in the agreement at the most could have no further effect than to give to bondholders who had deposited their bonds and wished to rescind the agreement the right to withdraw their own bonds. They would have no right to impose such rescission on owners who still desire the services of the committee. Surely the court was not obligated to raise collateral questions of this kind. The bonds were payable to bearer; the owners delivered them to the Bondholders' Committee. These same owners are a majority of the owners of bonds outstanding and in each case do not appear to question the right of possession

Watford Oil and Gas Co., v. Bloomer, 233 Ill. 9; Tyler v. Wells, 207 Ill. 234; Doe v. Tyler, 83 U.S. 86.

The contention is also made that the agreement was contrary to public policy, for the reason that it was [after the rights of the parties had] materially altered. The Boundary Commission, under the jurisdiction of the West Side Trust & Savings Bank, caused a new description for the bonds. The agreement provided for this but also declared that "each depositary should be vested with the power and duties and obligations of the original depositary." It is true the new depositary (The Livestock National Bank) did not assume the obligations the West Side Trust & Savings Bank had obligated itself to pay. However, by arrangement Mr. Morris of the Securities assumed these responsibilities. Now it is argued that by a breach of the agreement by which the depositors are released from their obligations under the agreement, and that by reason of their discharge the agreement has become void. Even assuming this was such a material alteration as to make void the entire agreement (which we do not think it was), we are unable to understand upon what theory any depositor would have a right to raise the question except those persons to whom owned and deposited by himself. In all these cases a majority in amount of the holders of the bonds are indicating an the validity of the depositary agreement and ask it be carried out. The change in the agreement of the bank could have no effect unless done to defraud the bondholders who had deposited their bonds and signed to release the agreement. The bank is standing their own bonds. They would have no rights to impose such objection to others who still desire the services of the depositary. Merely the bank was obligated to raise collateral sufficient to keep the bonds were payable to bearer; the owners delivered them to the depositaries' custodian. These bank owners are a majority of the owners of bonds represented and in each case do not appear to question the right of depositaries

or title of the committee. We think no other has a right to raise that question for them.

Finally, the contention is made that the depositary agreement is unconscionable. If that is true a majority of the owners of the bonds seems slow to discover the fact. Why the anxiety of others in behalf of those who do not complain, we are unable to understand. Masterson v. Wall, 365 Ill., 102, is cited, and it is urged that the burden is on the committee to justify the fairness of the agreement. If this were a suit for specific performance and the parties objecting were still parties to the contract this would be true; but this is not a suit for specific performance. However, we hold the depositary agreement is not unconscionable. It is a lengthy document, the evident purpose of which is to secure unity of action by the owners of these bonds. Its provisions (though subject to abuse) are appropriate to this end. If the committee faithfully carries out its obligations there will be no cause for complaint. The provision of the agreement as to the expenses assumed by the Bank, and now personally by Mr. Morris, is more than fair. Why any bondholder should object on that ground is difficult to understand. There is no finding charge made that the committee or any member of it has been negligent or derelict. There is no showing that Burnett is disqualified in any way. In each one of these cases a small minority of bondholders are attempting to wrest control of litigation from a majority of the owners of the bonds and from representatives who, so far as the record shows, have been entirely faithful in the discharge of their trust. Proceedings of this kind are for the benefit of the owners of the bonds, in order that the largest possible amount may be realized therefrom. Cohen v. Central Republic Trust Company, 282 Ill. App. 659, is applicable. On the authority of Schatzkis v. Rosenwald, 267 Ill. App. 169; Dillon v.

or title of the committee. He holds no other one a right to raise that question for them.

Finally, the conversion is made that the Corporation agreement is unconscionable. It that it is true a majority of the owners of the bonds seems also to discover the fact. Why the apathy of others in behalf of those who do not object in, we are unable to understand. Kentucken v. [illegible], 200 III., 1[illegible], and it is urged that the burden is on the complainant to justify the interest of the agreement. If this were a suit for specific performance and the parties objecting were suit parties to the contract this would be true; but this is not a suit for specific performance. However, we hold the depositary agreement is not unconscionable. It is a lengthy document, the evident purpose of which is to secure unity of action by the owners of these bonds. Its provisions (though subject to abuse) are appropriate to this end. If the committee faithfully carries out its obligations there will be no cause for complaint. The provision of the agreement as to the expenses assumed by the bank, and not personally by Mr. Harris, is more than fair. Why may not depositary secure object no such grounds is difficult to understand. There is no claim that the committee or any member of it has been negligent or fraudulent. There is no charge that Burnett is under bribe to any. In such are at issue owners a small minority of bondholders are attempting to wrest control of litigation from a majority of the owners of the issue and from representatives who, so far as the record shows, have been entirely fair in the discharge of their trust. Investments of this kind are for the benefit of the owners of the bonds, to great that the largest possible amount can be realized therefrom. Myers v. Central Republic Trust Company, 261 Ill. 434. And, is applicable. On the authority of Dougherty v. Peabody, 254 Ill. 440; Miller v.

Elmore, 276 Ill. App. 548, and Dillon v. Elmore, 361 Ill., 356, we hold that an order recognizing the appointment of Burnett as successor trustee and substituting him as plaintiff in the action should have been made.

Burnett contends here that the trial court lacked jurisdiction to enter the order setting aside his appointment and naming a successor trustee. He argues this upon the theory that the suit for foreclosure could not be joined with a suit for the appointment of a successor trustee. We do not find it necessary to decide that question. It may be that under the liberal provisions of the new Practice act such distinct causes of action might be joined. Trapp v. Gordon, 366 Ill., 102. But however this may be it is manifest that the foreclosure should not have been delayed on that account. There was no attempt made here to bring in all the owners of the bonds who were necessary parties in interest if the appointment of Burnett, as made by a majority of the bondholders, was to be set aside. There was no basis in the pleadings for the removal of one successor trustee and the appointment of another.

Burnett also contends that since the decree was entered by the Chancellor after his assignment to the Criminal court and after he had begun his work in that court, he was without power and jurisdiction to enter the decree. The record indicates that the Chancellor was sitting in the Circuit court and holding a branch of that court of which he was a judge and in which the decree was entered. His assignment by the executive committee to the Criminal court did not preclude his sitting in the Circuit court. Patchen v. Patchen, 364 Ill. 178. There is no merit in this point.

These cases, already unduly delayed by merely technical contentions, should be allowed to proceed under the guidance and direction of those chosen by a majority of the bondholders to conduct the

proceedings in their behalf. In this case and in each of these eight cases the decree of the Circuit court is reversed and the cause is remanded with directions to the court to enter an order confirming the appointment of Burnett as successor trustee and substituting him as plaintiff in the case. Also with directions to set aside the order appointing Peter B. Carey successor trustee and remove such order as a cloud on the title to the real estate involved in this foreclosure.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

39979

MINNIE JOHNSON,
Appellant,

vs.

DENNIS J. FINN,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

62 A

294 I.A. 615

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action by plaintiff upon the written guaranty by defendant of the payment of an issue of corporation bonds and upon trial by the court, there was on June 1, 1937, a finding for plaintiff in the sum of $1631.25 with judgment thereon, frommwhich no appeal has been taken.

Garnishment proceedings based on the judgment having been instituted on July 22, 1937, the defendant, Finn, on August 10, by leave of court filed a petition in the nature of a writ of audita querela, praying that the judgment might be satisfied. The petition set up in detail proceedings in the United States District Court for the Northern District of Illinois whereby the corporation debtor who issued the bonds applied for reorganization under Section 77-B of the Bankruptcy Act. That petition was filed May 6, 1936. All creditors and stockholders of the petitioning corporation were notified. A plan for reorganization was submitted and approved and on February 7, 1937, a final decree was entered whereby the debtor executed a new deed of trust conveying the same real estate to secure a new issue of bonds. The new bonds, to an amount as decreed by the United States District Court, were executed and delivered to the plaintiff, Minnie Johnson, against her protest, The United States District Court compelling her acceptance of these new bonds under the penalty of contempt. The petition of Finn, the debtor, prayed

MINNIE JOHNSON,
Appellant,
vs.
DENNIS J. KIRK,
Appellee.

APPEAL FROM UNITED STATES
DISTRICT COURT.

294 U.S. 615

MR. JUSTICE MCCOMBS DELIVERED THE OPINION OF THE COURT.

In an action by plaintiff upon the written guaranty by defendant of the payment of an issue of corporation bonds and upon trial by the court, there was on June 1, 1937, a finding for plaintiff in the sum of $1831.25 with interest thereon, from which no appeal has been taken.

Garnishment proceedings based on the judgment having been instituted on July 22, 1937, one Leibundt, Kirk, or Wagner Co., by leave of court filed a petition in the nature of a writ of error, praying that the judgment might be satisfied. The petition set up in detail proceedings in the United States District Court for the Northern District of Illinois whereby the corporation debtor had issued the bonds applied for reorganization under section 77-B of the Bankruptcy Act. That petition was filed May 9, 1933. All creditors and stockholders of the petitioning corporation were notified. A plan for reorganization was submitted and hearings and modified. On February 7, 1937, a final decree was entered whereby the debtor executed a new deed of trust covering the same real estate to secure a new issue of bonds. The new bonds, to an amount not exceeding $1,000,000, were guaranteed by the plaintiff, Minnie Johnson, appellant herein, the United States District Court, were executed and delivered to the Reconstruction Finance Corporation, or a wholly owned subsidiary, the penalty of guarantee. The petition of Kirk, the debtor, prayed

that the judgment theretofore entered should be vacated and the clerk directed to satisfy the judgment against him of record, and plaintiff be directed to accept the new bonds in exchange for her old ones. The petition was duly verified.

Plaintiff made a motion to strike the petition of August 10 for the reasons as specified: first, that the matters therein set up were available in defense of plaintiff's suit while it was pending and prior to the entry of the judgment, and innthe second place because the proceedings alleged to have taken place concerning the debtor corporation could in no way affect plaintiff's right to sue defendant upon his written guaranty of the bonds. The motion was denied and the court entered an order finding the facts as to the proceedings in the United States District court to be as recited, vacated the judgment and entered an order directing the clerk of the Municipal court to satisfy it of record. From that judgment plaintiff brings this appeal.

It is contended that the court was without jurisdiction to review its own finding and judgment,more than 30 days having expired after the entry of the judgment before the petition was filed; that defendant was not entitled to relief by audita querela since he had a legal opportunity to avail himself by way of defense of the matters set forth in his petition; that the renewal of a debt for which a guaranty has been given as collateral security does not release the liability of the guarantor, and that the contract of guaranty made by the defendant was not affected, discharged or abrogated by the proceedings or the decree of the District Court of the United States under Section 77-B of the Bankruptcy act. All these points are, we think, well taken. Section 21 of the Municipal Court act (see Smith-Hurd Illinois Annotated Stats., chap. 37, sec. 376) provides that judgments of the Municipal court shall become

old ones. The petition was duly verified.

Plaintiff made a motion to strike the petition of Lowry

10 for the reasons as specified: first, that the matters alleged

set up were available in defense of Lowry's suit while it was

pending and prior to the entry of the judgment, and hence should

place because the proceedings failed to have taken place conform-

ing the debtor corporation could in no way attack Lowry's rights

to sue defendant were in writing contrary of the statute. The motion

was denied and the court entered an order finding the facts so

the proceedings in the United States federal court to be as re-

cited, vacated the judgment and entered an order directing the

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plaintiff brings this appeal.

It is contended that the court had without jurisdiction to

review its own finding, and judgment, more than 30 days having ex-

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that defendant was not entitled to relief [illegible] since

had a legal opportunity to avail itself by way of defense or

matters set forth in his petition; that the removal of a suit

which a municipality has to it even as different country does not

release the liability of the principal, and that the contract of

guaranty made by the corporation was not affected, rescinded or

abrogated by the proceedings or the decree of the District court

of the United States under section 77-B of the bankruptcy act. We

these points are, we think, well taken. Section 21 of the [illegible]

Court act (as [illegible] 11th pt. Annotated statutes, comp. 37, sec.

376) provides that judgments of the municipal courts shall become

final after 30 days. The judgment here was entered on June 1, 1937. The petition to set it aside was not filed until August 10 in the same year. The court was then without jurisdiction to set the judgment aside. (Wackerlie v. Nies, 286 Ill. App. 51.)

Moreover, it affirmatively appears that while the action at law was pending against defendant every material fact now alleged in the petition was known to defendant and might have been presented as a defense to plaintiff's action. Not having availed himself of the opportunity to present this defense then he cannot do so now. (Harding v. Hawkins et al., 141 Ill. 572; 6 Corpus Juris 855, and Lovejoy v. Webber, 10 Mass. 101).

Further, the renewal of the debt for which Finn had given his written guaranty would not release him from his liability. (Fairbank v. Merchants Nat. Bank, 132 Ill., 120; Elgin Nat. Bank v. Goecke, 295 Ill. 403, and Weger v. Robinson Nash Motor Co., 340 Ill. 81).

Entirely conclusive, however, against defendant is the fact that the contract of guaranty made by him was not in any way affected, discharged or abrogated by the proceedings or the decree of the District Court of the United States, because that court, under the circumstances disclosed by the petition, was wholly without jurisdiction to enter a decree which would in any way impair the guaranty which defendant executed and delivered. This question has been squarely passed upon by the Supreme Court of Illinois in the case of Gottlieb v. Crowe, 368 Ill. 88. In that case the plaintiff brought suit in the Municipal court of Chicago against Crowe on three bonds of $500 each with interest, of which Crowe guaranteed the payment. There was a trial without a jury and a finding and judgment in plaintiff's favor. An appeal was taken to this court, where the judgment of the trial court was reversed. The record

showed that on January 15, 1927, the 1015 North Clark Building Corporation had issued its construction bonds for $250,000, and that the bonds sued upon were a part of this issue; that some years thereafter, being financially embarrassed, the corporation filed its petition in the United States District Court for the Northern District of Illinois under section 77-B of the Bankruptcy act as amended; that the District court entered a decree confirming a plan for reorganization of the property; that September 25, 1934, the debtor filed its proposed plan and a hearing thereon was set for November 5, 1934, notice being given to all creditors and stockholders by publication and by mail; that thereafter the plan was referred to a special master who reported that it was fair and equitable and complied with the provisions of sub-division B of section 77-B of the Bankruptcy act; that no objections were made to the plan and it was ordered and decreed that the report of the referee be approved and that the plan and order of confirmation should be binding upon the debtor, all stockholders and "all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims should have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted." The plan provided for the organization of a new corporation and issue of new securities to the stockholders and creditors. It also provided that all claims and rights of stockholders and creditors of the debtor upon the confirmation of the plan should be discharged and cancelled, and that the only rights of such stockholders and creditors should be those accruing to them in and through the security to be issued by the new corporation.

Notice of this hearing was given to plaintiff. After the plan was approved it was fully carried out and bonds aggregating 96% of the total bonds outstanding were surrendered and cancelled. Some of the creditors of the same class as the plaintiff filed written

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showed that on January 15, 1927, the 1015 South Clark Building Cor-

objections to the cancellation of the guaranty of defendant and moved that the confirmation of the plan as approved by the District court be vacated. The objections were referred to a special master to take evidence to report recommendations, which he did and recommended the objections be overruled. All the assets of the debtor corporation were transferred to the new corporation. Plaintiff did not appear in the proceedings in the District court, but during the pendency of the case in the Municipal court of Chicago filed his verified petition in the U. S. District court, setting up ownership of these three bonds, stating that he had not approved or accepted the plan of reorganization theretofore confirmed by the District court, and averring the District court did not have the power to cancel the written guaranty of defendant. He prayed that the District Court enter an order vacating or modifying the decree so as to eliminate the cancellation of the guaranty. The debtor filed a verified answer, setting up the transactions in that court, including the cancellation of the guaranty, the notices given to plaintiff and the several hearings had in the matters. The District court entered an order refusing to modify its decree approving the plan of reorganization. Thereafter plaintiff sued on the guaranty and obtained judgment in the Municipal court, which was reversed by this court in Gottlieb v. Crowe, 289 Ill. App. 595. The Supreme court granted leave to appeal and reversed the judgment of this court, as already stated. The Supreme court said:

"A Federal court is without jurisdiction to cancel a guaranty while sitting in bankruptcy under section 77-B for the re-organization of a 'debtor' corporation. (In re Diversey Building Corp., 86 Fed. (2d) 456; Nine North Church Street, Inc., 86 Fed. (2d) 186.) In the Diversey Building Corp. case the Circuit court of Appeals stated in its opinion: 'The question here presented is whether the district court had the power to release Becklenberg from his guaranty of the old bond issue in consideration of his guaranty of the new bond issue, pursuant to the re-organization plan which had been approved by the court after its acceptance by two-thirds in amount of the allowed and affected claims of each class of creditors, but which had not been accepted by appellants, who were bondholders of original issue. This question must be answered in the negative. * * * The trouble

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and obtained judgment in the Municipal court, which was reversed by
this court in Gottlieb v. Curtis, 298 Ill. App. 625. The Supreme
court granted leave to appeal and reversed the judgment of this
court, as already stated. The Supreme court said:

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while sitting in bankruptcy under section 77-B for the re-organization
of a 'debtor' corporation. (In re Fifty-Nine Holding Corp., 56 Fed.
(2d) 459; In re North River Bldg. Co., 59 Fed. (2d) 108.) In the
Driscoll case, supra, this court at page 627 of 298 Ill. App. stated in
its opinion: 'The decree could be entered only upon the finding
court had the power to release defendant from his guaranty of the
old bond issue in consideration of his assent to the new bond
issue, pursuant to the reorganization plan which had been approved by
the court after the exceptions by two-thirds in amount of the allowed
and adjusted claims of each class of creditors, but which had not
been accepted by appellants, who were bondholders of original issues.
This question must be answered in the negative. * * * The trouble

here is that the court exceeded its jurisdiction with respect to the subject matter before it.' The district court was wholly without jurisdiction of the subject matter of this guaranty and that part of its order was therefore void. See, also, Armstrong v. Obucino, 300 Ill. 140."

"In the case before us the district court did not have jurisdiction of the subject matter of the guaranty and its order in that respect is void and subject to collateral attack. (Demilly v. Grosrenaud, 201 Ill. 272; O'Connor v. Board of Trustees, 247 id. 54; Rabbitt v. Weber & Co., 297 id. 491; Ashlock v. Ashlock, 360 id. 115.) Jurisdiction of the subject matter can not be conferred by consent, is not waived by appearance and may be raised at any time. Town of Kingston v. Anderson, 300 Ill. 577; Rabbitt v. Weber & Co., supra."

This decision of the Supreme court is conclusive upon the issues here. It is worthy of notice that in that case the plaintiff had participated in the proceedings of the United States District court, and that this court upon the appeal based its conclusion entirely upon the fact that plaintiff had actively and actually participated in such proceedings. If a plaintiff is not bound in such a case where he so participates much less would he be bound where, as here, there was no such voluntary participation.

The Court of Appeals of New York reached a similar conclusion under analogous facts in the case of Union Trust Co. of Rochester v. Willsea, 275 N. Y. 164, 9 N. E. (2nd Series) 820.

For the reasons indicated we hold that the trial court erred in setting aside the judgment of June 1, 1937. The judgment is therefore reversed and the cause is remanded with directions to reinstate the judgment of the Municipal court.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

39994

DAVID JETZINGER,
Appellant,

vs.

LOUIS METCOFF et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

294 I.A. 616

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on a note and written guaranty thereof and upon trial by the court there was a finding for defendant with judgment, from which plaintiff appeals.

The note, so called, is a writing dated June 26, 1928, whereby the maker promised to pay the principal amount of $13,250 with interest. The writing recites that payment of the note is secured by a trust deed of even date conveying lands in Cook county, Illinois, in the trust deed described. It further recited:

"This note is executed by The Foreman Trust and Savings Bank, not personally but as Trustee as aforesaid in the exercise of the power and authority conferred upon and vested in it as such Trustee, and is payable only out of the property specifically described in said Trust Deed securing the payment hereof, by the enforcement of the provisions contained in said Trust Deed. No personal liability shall be asserted or be enforcible against the promissor or any person interested beneficially or otherwise in said property specifically described in said Trust Deed given to secure the payment hereof, or in the property or funds at any time subject to said trust agreement, because or in respect of this note or the making, issue or transfer thereof, all such liability, if any, being expressly waived by each taker and holder hereof and each original and successive holder of this note accepts the same upon the express condition that no duty shall rest upon the undersigned to sequester the rents, issues and profits arising from the property described in said Trust Deed, or the proceeds arising from the sale or other disposition thereof, but that in case of default in the payment of this note or of any installment of interest, the sole remedy of the holder hereof or of any of the intere st coupons hereto attached shall be by foreclosure of the said Trust Deed given to secure the indebtedness evidenced by this principal note and the interest notes hereto attached, in accordance with the terms and provisions in said Trust Deed set forth."

The document is executed, "The Foreman Trust and Savings Bank, as Trustee as aforesaid and not personally. By Chas. A. McDonald, Vice-President. Attest Richard Fischer, Assistant Secretary."

DAVID METZGER,
Appellant,

vs.

LOUIS METCOFF et al.,
Appellees.

MR. JUSTICE MACOMBER DELIVERED THE OPINION OF THE COURT.

In an action on a note and written guaranty thereof and upon trial by the court there was a finding for defendant and judgment, from which plaintiff appeals.

The note, so called, is a writing dated June 30, 1926, whereby the maker promised to pay the principal amount of $4,250 with interest. The writing recites that payment of the note is secured by a trust deed of even date conveying lands in Cook county, Illinois, in the trust deed described. It further recites:

"This note is executed by the foregoing Trust and Savings Bank, not personally but as Trustee as aforesaid in the exercise of the power and authority conferred upon and vested in it as such Trustee, and it is expressly understood that neither the said Trust Bank nor any of the beneficiaries under said Trust Deed, or any person claiming by, through or under them shall have any personal liability to pay the indebtedness hereby secured or any part thereof, or perform any of the covenants made in said Trust Deed, or any agreement herein contained, all such liability, if any, being expressly waived by every holder hereof and every person claiming by, through or under any holder hereof, and that so far as the said Trust Bank is concerned the owner of any indebtedness hereby secured shall look solely to the premises hereby conveyed for the payment thereof by the enforcement of the provisions contained in said Trust Deed and of any and all other instruments now or hereafter executed by the Trustee in connection therewith, but this shall in no way affect the personal liability of any person who may become liable for the payment of the indebtedness hereby secured."

The document is executed, "The Foreman Trust and Savings Bank, as Trustee as aforesaid and not personally. By Chas. A. Donald, Vice-President. Attest Richard Simons, Assistant Secretary."

This writing came into existence in this wise. January 28, 1924, an agreement in writing, known as Trust Number 1433, was executed and delivered to the Foreman Bank. The agreement recited that the bank was about to take title to premises in Cook county as described, and any other real estate that might be deeded to it, to hold title for the ultimate use and benefit of Dimitreos Limberopulos, Louis Metcoff, Eleanore Perbohner, Bebe Burr, Anna Ruekberg and Paula Beederman, who each hold an undivided one-sixth interest in the premises conveyed; that it was agreed -

"That the interest of any beneficiary hereunder shall consist solely of the right to receive the proceeds from rentals or from sales of said premises, and that such right in the avails of said property shall be deemed to be personal property, and may be assigned and transferred as such; that in case of the death of any beneficiary hereunder during the existence of this trust, his or her right or interest hereunder shall pass to his or her executor or administrator, and not to his or her heirs at law; and that no beneficiary now has, and that no beneficiary hereunder at any time shall have, any right, title or interest in or to any portion of said real estate as such, but only an interest in the proceeds as aforesaid; it being the intention of this instrument to vest the full legal and equitable title to said premises in said trustee. No assignment of an interest hereunder shall be binding on the trustee until the original or duplicate copy of the assignment is lodged with it."

The instrument contains further provisions usual in such trust agreements with the provision that the Foreman Trust and Savings Bank, while the sole owner of the real estate with full power to deal with it, will deal with it, however, only when authorized to do so, and that it will, on the written direction of Dimitreos Limberopulos, Louis Metcoff, Eleanore Perbohner, Bebe Burr, Anna Ruekberg and Paula Beederman, or of such other person or persons as may be beneficiaries, make deeds for and otherwise deal with the title to said real estate, provided, however, that the trustee shall not be required to enter into any personal obligation or liability in dealing with the land or make itself liable for any damages, costs, expenses, fines or penalties; that the beneficiary or beneficiaries shall have the management and control of the property, and of the selling, renting and handling thereof, and any beneficiary or his

This writing came into existence in this wise. January 24, 1924, an agreement in writing, known as Trust Number 1411, was executed and delivered to the Oregon Bank. The agreement recited that the bank was about to take title to premises in Cook County as described, and any other real estate that might be deeded to it, to hold title for the ultimate use and benefit of Christian Andreasloe Louis Retcoff, Flamore Perbohner, Gabe Burr, Anna Boerner and Paula Beederman, who each held an undivided one-sixth interest in the premises conveyed; that it was agreed -

"That the interest of any beneficiary hereunder shall consist solely of the right to receive his proportionate share of rentals or from sales of said premises, and that such right in the profits of said property shall be deemed to be personal property, passing by assigned and transferred as such; that in case of the death of any beneficiary hereunder during the existence of this trust, his or her right or interest hereunder shall pass to his or her executor or administrator, and not to the heirs or next of kin; but that no beneficiary now has, or that he will have no beneficiary hereunder at any time shall have, any right, title or interest in or to any portion of said real estate as such, but only a right to receive as aforesaid; it being the intention of this instrument to vest the full legal and equitable title to said premises in said trustee, with full power to sell, convey and dispose of the same, but no assignment of an interest hereunder shall be binding on the trustee until the original or duplicate copy thereof shall be lodged with it."

The instrument contains the usual provisions upon the usual agreements with the usual exceptions. On January 24, 1924, Bank, while the sole owner of the real estate, it had power to deal with it, will deal with it, hereafter, only when authorized to do, and that it will, on the written direction of Christian Andreasloe, Louis Retcoff, Flamore Perbohner, Gabe Burr, Anna Boerner and Paula Beederman, or of such other person or persons as may be beneficiaries, make deeds for and otherwise deal with said real estate, provided, however, that the trustee shall not be required to enter into any personal obligation or liability in dealing with the land or upon its own initiative, except, as aforesaid, have the management and control of the property, and of the selling, renting and handling thereof, and any provision of the

agent, shall handle the rents and the proceeds of sales, and the trustee shall not be called upon to do anything in the management or control of said property except on the written direction of the beneficiaries after the payment to it of all money necessary to carry out instructions. If any property remained in the trust twenty years from date it should be sold at public sale by the trustee on reasonable notice and the proceeds divided among those entitled thereto under the agreement. This trust agreement is also executed by the Foreman Trust and Savings Bank, by Charles A. McDonald, Vice-President. The seal of the corporation is attached, and the document attested by the Assistant Secretary.

This note was executed by authority and direction of the six beneficiaries. It was one of 35 similar notes for the aggregate amount of $22,000.

Shortly after the execution of the note and trust deed this note, so called, was sold anddelivered to plaintiff Jetzinger, who deposited it with the Continental National Bank of Chicago as security. At the time of its execution and delivery to Jetzinger no guaranty was upon or attahhed to it. Plaintiff, however, testified over objection that in April, 1930, Oscar Beederman and Maurice Butr came to him (this being two years after the execution of the note) told him they were the real owners of the trust property and the beneficiaries of the trust; that the property had depreciated in value; that they were afraid that he might lose his money, and that they wished to guarantee the instrument; that if plaintiff would let them have it they would ask the other beneficiaries to join in the execution of a guaranty. Plaintiff says he went to the bank, got the note or writing, and delivered it to Ruekberg and Butr. A few days afterward they brought the note to his office and said, "Here is your note." At that time there appeared written on the back of it a guaranty as follows:

agent, shall handle the rents and the proceeds of sales, but the
trustee shall not be called upon to do anything in the management
or control of said property except on the written direction of the
beneficiaries after the payment to it of all money necessary to carry
out instructions. If any property remains in the trust twenty years
from date it should be sold at public sale by the trustee on reasona-
ble notice and the proceeds divided among those entitled thereto
under the agreement. This trust agreement is also executed by the
Foreman Trust and Savings Bank, by Charles A. Schmidt, Vice-
President. The seal of the corporation is affixed, and the signature
attested by the Assistant Secretary.

This note was executed by Gutzrity and Creation of the
six beneficiaries. It was one of 35 similar notes for the ag re-
gate amount of $[illegible].

Shortly after the execution of the note and trust deed this
note, so called, was sold and delivered to Christ Detzbuer, who
deposited it with the Continental Clothiers Bank of Chicago as se-
curity. At the time of its execution and delivery to Detzbuer no
warrant was upon or attached to it. Gutzrity, however, testified
over objection that in April, 1930, Oscar Beiderman and Maurice
Burr came to him (this being two years after the execution of the
note) told him they were the real owners of the trust property and
the beneficiaries of the trust; that the property had depreciated
in value; that they were afraid that Gutzrity might lose his money, and
that they wished to guarantee the interest; that if Gutzrity
would let them have it they would get the other beneficiaries to
join in the execution of a guaranty. Gutzrity made no effort to get
Burr, got the note or anything, and delivered it to Beiderman and
Burr. A few days afterward they brought the note in his office and
said, "Here is your note." At that time there appeared written on
the back of it a guaranty as follows:

"For and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to the undersigned in hand paid, receipt whereof is hereby acknowledged, we, the undersigned, hereby jointly and severally guarantee the prompt payment of the principal sum in said note set forth and interest thereon, as and when the same matures by the terms thereof. Oscar Beederman, Maurice Burr, Louis Metcoff, D. Limberopulos."

This guaranty was executed and delivered in April, 1931. Plaintiff did not pay to the signers or any of them the dollar mentioned in this guaranty nor give other consideration. Plaintiff also says that thereafter Burr came to his office and said the beneficiaries and owners desired that plaintiff extend the time of payment of the note. Plaintiff said if all wanted it he would be glad to enter into such an agreement. Thereafter Burr brought to him and at Burr's request he signed the extention agreement dated June 24, 1931, which is in evidence. The instrument declares itself to be an agreement between Jetzinger, as owner, and the Foreman Trust and Savings Bank as trustee, etc. The evidence showsthat the Foreman Trust and Savings Bank executed this agreement pursuant to a writing dated June 24, 1931, authorizing and directing it so to do, signed by Bebe Burr, Anna Ruekberg, Paula Beederman, Louis Metcoff and D. Limberopulos. It recites that the parties have agreed to an extension of time of payment of the unpaid balance of note 36 upon terms and conditions set forth; that all the provisions of the trust deed shall stand and remain unchanged, in full force and effect except as specifically varied or amended; that the agreement is executed by the Foreman Trust and Savings Bank, not personally but as trustee in the exercise of the power and authority vested in it as such trustee. It specifically provides:

"No personal liability shall be asserted or be enforcible against Foreman-State Trust and Savings Bank or against any person interested beneficially or otherwise in said property specifically described in said Trust Deed given to secure the payment of the indebtedness herein described or in the property or funds at any time subject to said Trust Agreement, because of or in respect to this agreement, all such liability, if any, being expressly waived by the party of the first part and by each taker and holder of the principal

"For and in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration in the aforesaid in hand paid, receipt whereof is hereby acknowledged, the undersigned, hereby jointly and severally covenant and promise to pay the principal sum in said note set forth and interest thereon, as and when the same matures by the terms thereof, Cedar Terrace Service Burr, Donald Westcott, J. Kirkpatrick."

This guaranty was executed and delivered in April, 1931. Plaintiff did not pay to the signers or any of them the call for maturity in this guaranty nor give other consideration. Plaintiff also says that thereafter Burr came to his office and said the negotiations and owners desired that plaintiff extend the time of payment of the note. Plaintiff said if all matter if he would be glad to enter into such an agreement. Thereafter Burr brought in the old at Burr's request he signed the extension agreement dated June 24, 1931, which is in evidence. The instrument declares itself to be an agreement between Jennings, the owner, and the Potomac Trust and Savings Bank as trustee, etc. The evidence now shows the Potomac Trust and Savings Bank executed this agreement pursuant to a writing dated June 24, 1931, authorizing and directing it so to do, signed by Jane Burr, Anne Hunter, Paul Jennings, Monie Knight and A. Hunter-puiss. It recites that the parties have agreed to an extension of time of payment of the unpaid balance of note 35 upon terms and conditions set forth; that all the provisions of the aforesaid note remain unchanged, in full force and effect except as specifically varied or amended; that the agreement is executed by the Potomac Trust and Savings Bank, not personally but as trustee in the exercise of the power and authority vested in it as such trustee.

It specifically provides:

"No personal liability shall be asserted or be enforcible against Potomac Trust and Savings Bank or against any person interested personally or otherwise in said property specifically described in said Trust Deed given to secure the payment of the indebtedness hereby modified or in the property or funds at any time subject to said Trust Agreement, because of or in respect to this agreement, all such liability, if any, being expressly waived by the party of the first part and by each taker and holder of the principal

and interest notes. That in case of default in the payment of said notes, or of any installment of interest, the sole remedy of the holder thereof shall be by foreclosure of the said Trust Deed given to secure said principal and interest notes, in accordance with the terms and provisions in said Trust Deed * *.* or by action to enforce the personal liability, if any, of the maker or makers, guarantor or guarantors of said principal note or notes."

The evidence shows that the last payment of principal and interest was made on July 1, 1932, and that no payments have been made since that date; that there is now due on the note the sum of $10,000 with interest. The trial court, apparently upon the theory that liability upon the principal note was expressly excluded by the terms of the writing and liability upon the guaranty excluded by the fact that it was given long after the original transaction took place, in which the note was issued, was therefore without consideration and unenfoceable, found for the defendant.

The plaintiff in this case states his theory to be that the Foreman Trust and Savings Bank, "so called trustee," in the making of the note was in fact acting as agent of defendants; that defendants were therefore in fact undisclosed principals and liable from the beginning for the repayment of the amount represented by the note; that the endorsement by defendants of the guaranty of payment was not intended to be, and was not, a collateral promise to pay, since that would amount to a guaranty by the makers thereof of their own obligation, but on the contrary was executed in recognition of their primary obligation and operated to waive restrictions in their favor as to source of payment and to make them unconditionally liable to the holder of the note for the indebtedness it represented.

The theory of defendant is ingenious but not convincing. We think it is excluded by the written provisions of the note, so called, of the trust deed and the trust agreement. We had occasion recently to consider the nature of similar documents executed under similar circumstances. Stewart v. McIntosh, 291 Ill. App. 65, 9 N.E. (2d)

and interest notes. That in case of default in the payment of said
notes, or of any instalment of interest, the whole remedy of the
holder thereof shall be by foreclosure of the said trust deed given
to secure said principal and interest notes, in accordance with the
terms and provisions in said trust deed." * * * by reason by en-
force the personal liability, if any, of the maker or makers,
guarantor or guarantors of said principal note or notes."

The evidence shows that the last payment of principal and
interest was made on July 1, 1940, and that no payments have been
made since that date; that there is now due on the note the sum of
$10,000 with interest. The trial court, accordingly upon the theory
that liability upon the principal note was expressly retained by
the terms of the writing and liability upon the guaranty existing
by the fact that it was given long after the original transaction
took place, in spite the note was issued, was therefore without con-
sideration and unenforceable, found for the defendants.

The plaintiff in this case states his theory to be that the
foreclosure trust deed having been, "A valid finding," in the pending
of the note was in fact nothing an equal of foreclosure; that interest-
ests were therefore in fact indistinguishable and single from
the beginning for the recovery of the amount represented by the
note; that the endorsement by defendants of the guaranty of payment
was not intended to be, and was not, a collateral promise to pay,
since that would amount to a guaranty by the mortgagors against their
own obligation, but on the contrary was executed in recognition of
their primary obligation and collateral to waive restrictions & their
favor as to source of payment and be under them unconditionally liable
to the holder of the note or the indebtedness as contemplated.

The theory of defendants is ingenious but not convincing. We
think it is excluded by the written provisions of the note, as noted
of the trust deed and the other agreement. We and decline reasonably
to consider the matter at length. Different elements entered under another
circumstances. Stewart v. Lehigh, 30 Fla. 397, 12 L.R.A. (NS)

427. We there held that an instrument in writing, such as this so called note, was neither a negotiable instrument nor a promissory note; that the beneficiaries of the trust were not liable thereon by a mere endorsement or by reason of the fact that they were beneficiaries in the absence of some evidence showing an intention to assume personal liability. The theory here urged was not presented there, namely, that the trustee was the agent of the beneficiaries and undisclosed principals, who were therefore liable upon the contracts made by their agent. We think it is quite impossible to create a liability by **quasi contract** upon persons who the writings expressly say shall in no case be liable. That theory, if adopted, would preclude the possibility of the creation of a trust of this kind without the beneficiaries assuming the obligations usually assumed by partners in a joint enterprise.

The distinction between the business trust and a partnership is pointed out by the Supreme court in Schumann-Heink v. Folsom, 328 Ill. 321, on which plaintiff here relies. After illustrating by cases, the court says:

"The declaration of trust involved in this case created a business trust and not a partnership. This being true, the trustees had no authority to bind the cestui que trust, because a trustee is not an agent. When a trustee contracts he does so for himself. He has no principal. The contract is the personal undertaking of the trustee, and if he wants to protect himself from individual liability on the contract he must stipulate that he is not to be personally responsible and that the other party is to look solely to the trust estate. (Taylor v. Mayo, 110 U. S. 330, 4 Sup. Ct. 147; Austin v. Parker, 317 Ill. 348; Bradner Smith & Co. v. Williams, 178 id. 420.) In the case at bar the trustees did limit their liability by specifically stating that the contract was executed 'not individually but as such trustees to bind the trust estate.' Under the authorities this was sufficient. A covenant by trustees, 'as such trustees but not otherwise,' to repay a loan is a covenant to repay the money out of the trust fund, only, and does not impose any personal liability upon the trustees."

The opinion goes on to state that an agreement to carry on a business by trustees who thus limit their liability is not contrary to the public policy of this State.

there
427. We would cast an instrument in writing, such as this we called
note, was neither a negotiable instrument nor a promissory note;
that the beneficiaries of the trust were not liable over in a
more enforcement or by reason of the fact that they were benefici-
ries in the absence of some evidence showing an intention to assume
personal liability. The theory here urged was not presented there,
namely, that the trustee was the agent of the beneficiaries and
undisclosed principals, and that therefore liable upon the contracts
made by their agent. We think it is quite impossible to create a
liability by unsaid contract upon persons who are striving earnestly
say small in no case be liable. That theory, if accepted, would pre-
clude the possibility of the creation of a trust of this kind without
the beneficiaries assuming the obligations usually entered by part-
ners in a joint enterprise.

The distinction between the business trust and a partnership
is pointed out by the Supreme Court in Commissioner v. Pierce, 296
III. 321, on which plaintiff in error relies. After discussing the
cases, the court says:

"The declaration of trust involved in this case created a
business trust and not a partnership. This being true, the trustees
had no authority to bind the creator of the trust, because it vested
not an agent. When a trustee is chosen because of his personal
ness no principal. The contract is the personal undertaking of the
trustee, and it is proper to permit them [illegible]
on the contract as must clearly show that it was to be personally
responsible and [illegible] only in so far as to
estate. (Taylor v. Penn, 140 U. S. 25, 1 Sup. Ct. 17; Leeds v.
Parker, 314 Ill. 72; Pierce v. [illegible], 314 Ill. 44.)
In the case at bar the trustees did not [illegible]
tically stating that the contract was [illegible]
but as such trustees to bind the trust estate.' Under the circum-
stance this was sufficient. A trustee is, 'by this process,
but not otherwise,' to incur a loss in a manner the money
out of the trust funds, and' [illegible] any personal lia-
bility upon the trustee."

The opinion goes on to state that an agreement to carry on a business
by trustees who take their chief liability is not contrary to the
public policy of this State.

In Bogart on Trusts and Trustees, vol. 1, sec. 15, the narrowness of the distinction which as times exists between an agent and a trustee is pointed out, and cases are cited showing that some courts have used the words "agent" and "trustee" without careful discrimination. The author points out that the germ of agency is hardly to be distinguished from the germ of the trust. The distinguishing fact, however, appears to be that the trustee, unlike the mere agent, is invested with a title upon which his powers are exercised. In the last analysis it would seem the question of whether the relationship created is that of trustee or agent would depend upon the intention of the parties as manifested and expressed by their writings and conduct.

There can be no doubt of what was the intention of the parties to this indenture. They intended to create a trust to be controlled through a trustee and not by an agent. The Foreman bank was not the mere agent of the beneficiaries of the trust. The beneficiaries did not stand in the relationship of principals, either disclosed or undisclosed, with reference to the execution of the so called note by the bank. Indeed, there was nothing undisclosed about the matter. In the clearest possible way every document expressly set forth that there should be no liability other than that of the application of the proceeds of the real estate to the satisfaction of the indebtedness represented by the so called note. That intention (being expressly stated) left no room for liability upon the theory of quasi contract. It follows that the beneficiaries were not liable upon the note. The evidence shows without contradiction that the guaranty was collateral to the promise of the bank as expressed in the so called note; that it was executed voluntarily long after the original transaction and without consideration. Defendants, therefore, were not liable on the guaranty. Not being liable either upon the theory that they were beneficiaries nor upon the theory that they were

guarantors, it follows that plaintiff could not recover, and that the finding and judgment of the court was the only one that could properly have been entered. The judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

39891

B. J. DOLAN, as Successor Trustee, etc.,
Plaintiff,

vs.

JACOB DUBOV et al.,
Defendants.

E. R. BURNETT, as Successor Trustee, etc., Petitioner, and L. H. HEYMANN et al., Bondholders' Committee, Defendants,
Appellants,

vs.

PETER B. CAREY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 616

PER CURIAM.

The material facts in this case and the issues involved are similar to those which have been stated in General Number 39892, Dolan v. Morensky, opinion this day filed. For the reasons stated in that opinion the decree appointing Peter B. Carey as Successor Trustee will be reversed and the cause remanded with directions to enter an order appointing E. R. Burnett as Successor Trustee and substituting him as plaintiff in the suit.

REVERSED AND REMANDED WITH DIRECTIONS.

D. J. DOYAL, as Successor Trustee, etc., et al., Plaintiff,	
vs.	
JACOB SIBOV et al., Defendants.	
EL E. DUNCAN, as Successor Trustee, etc., Petitioner, et al., Respondents/Co-Relators,	
vs.	
PETER J. DARBY et al., Appellees.	

2941 I.A. 616

[illegible].

The material facts in this case and the issues involved are similar to those which have been stated in Control Number 29802, Dolan v. Kennedy, opinion this day filed. For the reasons stated in that opinion the decree appointing Peter E. Darby as Successor Trustee will be reversed and the cause remanded with directions to enter an order appointing E. E. Duncan as Successor Trustee and substituting him as plaintiff in the suit.

REVERSED AND REMANDED WITH DIRECTIONS.

39893

B. J. DOLAN, as Successor Trustee, etc.,
Plaintiff,

vs.

SAMUEL FIRER et al.,
Defendants.

E. R. BURNETT, as Successor Trustee, etc., Petitioner, and L. H. HEYMANN, et al., Bondholders' Committee, Defendants,
Appellants,

vs.

PETER B. CAREY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 616

PER CURIAM.

The material facts and questions of law involved in this appeal are similar to the questions decided in the case of B. J. Dolan v. Rubin Morensky, General No. 39892, in which an opinion is this day filed. For the reasons stated in that opinion the decree of the Circuit court of Cook county will be reversed and the cause remandeed with directions to enter an order setting aside the appointment of Peter B. Carey as Successor Trustee and to enter an order confirming the appointment of E. R. Burnett as Successor Trustee and substituting him as plaintiff in the case.

REVERSED AND REMANDED WITH DIRECTIONS.

PER CURIAM.

39894

B. J. DOLAN, as Successor Trustee, etc.,
Plaintiff,

vs.

MORRIS B. SCHER et al.,
Defendants.

E. R. BURNETT, as Successor Trustee, etc., Petitioner, and L. H. HEYMANN et al., Bondholders' Committee, Defendants,
Appellants,

vs.

PETER B. CAREY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 616

PER CURIAM.

The material issues of fact and law in this case are similar to those in B. J. Dolan v. Rubin Morensky et al., Gen. No. 39892, in which an opinion is this day filed. For the reasons stated in that opinion the decree of the Circuit court of Cook county is reversed and the cause remanded with directions to set aside the order appointing Peter B. Carey as Successor Trustee, etc., and to enter an order confirming the appointment of E. R. Burnett as Successor Trustee and substituting him as plaintiff in the action.

REVERSED AND REMANDED WITH DIRECTIONS.

M. J. DEAN, as Successor Trustee, etc.,
Plaintiff,

vs.

NORRIS D. SCOTT et al.,
Defendants.

M. R. BURNETT, as Successor Trustee, etc.,
Petitioner, and J. M. DUNCAN et al.,
Bondholders' Committee, Intervenors,
Appellants,

vs.

PETER J. CAREY et al.,
Appellees.

No. 3482

Opinion.

The material issues of fact and law in this case are similar to those in C. C. Dyer v. Rocky Mountain Consumers Co., etc., No. 3482, in which an opinion is this day filed. For the reasons stated in that opinion the decree of the District Court is in each case reversed and the cause remanded with directions to set aside the order appointing Peter J. Carey as Successor Trustee, etc., and to enter an order confirming the appointment of M. J. Dean as Successor Trustee and submit nothing else as finality is to the action.

39895

B. J. DOLAN, as Successor Trustee, etc.,
Plaintiff,

vs.

ISIDORE GOLDBLATT et al.,
Defendants.

E. R. BURNETT, as Successor Trustee, etc., Petitioner, and L. H. HEYMANN et al., Bondholders' Committee, Defendants,
Appellants,

vs.

PETER B. CARey et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 616

PER CURIAM.

The issues of fact and law in this case are similar to those in the case of Dolan v. Morensky, Gen. No. 39892, in which an opinion is this day filed. For the reasons stated in that opinion the decree of the Circuit court of Cook county is reversed and the cause remanded with directions to set aside the order appointing Peter B. Carey as Successor Trustee and to enter an order confirming the appointment of E. R. Burnett as Successor Trustee and substituting him as plaintiff in the action.

REVERSED AND REMANDED WITH DIRECTIONS.

B. J. DOLAN, as Executor of Trustee, etc.,
Plaintiff,

vs.

ISIDORE SOLOMBLATT et al.,
Defendants.

E. R. ADRIANI, as Successor Trustee, etc.,
Petitioner, and L. G. CHIARINI et al.,
Bondholders' Committee, Intervenors,
Appellants,

vs.

PERRY B. DARBY et al.,
Appellees.

PER CURIAM.

The issues of fact and law in this case are similar to those in the case of Chiarini v. Darby, Fla. 40 So. 2d. In order an opinion in this one files. For the reasons stated in that opinion the decree of the Circuit Court of Dade County is reversed and the cause remanded with direction to set aside the order appointing Peter B. Darby as Successor Trustee and to enter an order confirming the appointment of S. G. Bennett as Successor Trustee and substituting him as plaintiff in the action.

REVERSED AND REMANDED WITH DIRECTIONS.

39896

B. J. DOLAN, as Successor Trustee, etc.,
Plaintiff,

vs.

JAMES LA VELLE et al.,
Defendants.

E. R. BURNETT, as Successor Trustee, etc.,
Petitioner, and L. H. HEYMANN et al.,
Bondholders' Committee, Defendants,
Appellants,

vs.

PETER B. CAREY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I A. 616

PER CURIAM.

The material issues of fact and of law in this case are similar to those in Dolan vs. Morensky, General No. 39892, in which an opinion is this day filed. For the reasons stated in that opinion the decree of the Circuit court of Cook county is reversed and the cause is remanded with directions to set aside the order appointing Peter B. Carey as Successor Trustee and to enter an order confirming the appointment of E. R. Burnett as Successor Trustee and substituting him as plaintiff in the cause.

REVERSED AND REMANDED WITH DIRECTIONS.

39896

The material issues at hand are of the same
similar to those in Doyle vs. Gormley, Decree
an opinion is this day filed. For the reasons
the decree of the District court of Lake county
cause is remanded with directions to set aside
Peter B. Carey be successor trustee and to enter
the appointment of T. B. Burnett as successor
tuting him as plaintiff in the cause.

39897

B. J. DOLAN, as Successor Trustee, etc.,
Plaintiff,

vs.

HARRY LIEBERMAN et al.,
Defendants.

E. R. BURNETT, as Successor Trustee, etc.,
Petitioner, and L. H. HEYMANN et al.,
Bondholders' Committee, Defendants,
Appellants,

vs.

PETER B. CAREY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 616

PER CURIAM.

The issues of fact and of law in this appeal are similar to those in Dolan v. Morensky, Gen. No. 39892, in which an opinion is this day filed. For the reasons stated in that opinion the decree of the Circuit court of Cook county is reversed and the cause is remanded with directions to set aside the order appointing Peter B. Carey as Successor Trustee and to enter an order confirming the appointment of E. R. Burnett as Successor Trustee and substituting him as plaintiff in the action.

REVERSED AND REMANDED WITH DIRECTIONS.

E. J. DOLAN, as Assessor [illegible],
Plaintiff,

vs.

HARRY LIEBERMAN et al.,
Defendants.

E. M. DUFFETT, as Assessor [illegible],
Petitioner, and E. HAYLING et al.,
Respondents-Cross-Petitioners,

vs.

PETER J. DARBY et al.,
Appellees.

29 I.A. 616

The issues of fact and of law in this appeal are similar to those in Dolan v. Hornsby, Nos. 39137, in which we opinion in this day filed. For the reasons stated in that opinion the decree of the district court of Cook county is reversed and the cause is remanded with directions to set aside the order quashing Peter J. Darby as assessor [illegible] and to enter an order overruling the application of E. M. Duffett as Assessor [illegible] and substituting him as plaintiff in the action.

39898

B. J. DOLAN, as Successor Trustee, etc.,
Plaintiff,

vs.

JACOB ROTTER et al.,
Defendants.

E. R. BURNETT, as Successor Trustee, etc., Petitioner, and L. H. HEYMANN et al., Bondholders' Committee, Defendants,
Appellants,

vs.

PETER B. CAREY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

294 I.A. 615

PER CURIAM.

The material facts and questions of law involved in this case are similar to those decided in Dolan, as Successor Trustee, etc. v. Rubin Morensky et al., Gen. No. 39892, in which an opinion is this day filed. For the reasons stated in that opinion the decree of the trial court is reversed and the cause is remanded with directions to set aside the order naming Peter B. Carey as Successor Trustee and to enter an order confirming the appointment of E. R. Burnett as Successor Trustee and substituting him as plaintiff in the suit instead of Peter B. Carey.

REVERSED AND REMANDED WITH DIRECTIONS.

39868

B. J. DOLAN, as successor trustee, etc.,
Plaintiff,

vs.

Jacob SUTTER et al.,
Defendants.

B. B. BURNETT, as successor trustee, etc.,
Petitioner, and L. L. HEYMANN et al.,
Bondholders' Committee, Intervenor,
Appellants,

vs.

Peter E. DAVEY et al.,
Appellees.

9243

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

294 I.A. 617

Reh'g den 3-23-38

BE IT REMEMBERED, that afterwards, to-wit: On FEB 15 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9243 Agenda No. 24

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A.D. 1937.

A.W. Francke, et al.,

Appellants

vs.

Benjamin Eadie, et al.
(William W. Eadie, as Executor of the Last Will and Testament of Benjamin Eadie, deceased, et al.,

Appellees).

Appeal from Circuit Court Jo Daviess County.

HUFFMAN - J.

This was a suit in chancery filed by appellants on December 28, 1925. General and special demurrers were filed to the bill. These demurrers were argued before the sitting Judge, and taken under advisement by him on August 30, 1929. Subsequently, due to the retirement of that Judge, there has been a succession to the jurisdiction. Nothing further transpired in the case until November 7, 1934, when the Judge then presiding over the Circuit Court of Jo Daviess county entered a notation on his docket - cause stricken under Rule 7. Nothing further transpired until November 9, 1936, when appellants filed their motion to vacate the order striking the cause from the docket, and to reinstate same. The court denied the motion and this appeal follows:

Rule 7 of the Circuit Court of said county is as follows:

> "Herafter, on the call of the docket, both law and chancery, all old cases remaining thereon, in which positive action has not been taken, and no attempt made for trial or final disposition of the same during three years next preceding such call, may be dismissed or stricken from the docket at the costs of the plaintiff or complainant, as the case may be. The fact that any case has been placed on the trial docket at any term will not alone be sufficient to defeat the operation of this rule."

IN THE SUPREME COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A.D. 1937.

A.A. Francke, et al.,

Appellants

vs.

Benjamin Radie, et al.
(William W. Radie, as Executor
of the Last Will and Testament
of Benjamin Radie, deceased,
et al.,

Appellees).

Appeal from Circuit Court
of DeKalb County.

HURFORD - 1.

This was a suit in chancery filed by appellants on December 28, 1935. General and special demurrers were filed to the bill. These demurrers were argued before the Hitting Judge, and taken under advisement by him on August 20, 1936. Subsequently, due to the retirement of that Judge, there was a reargument to the Judge Presiding. Nothing further transpired in the case until November 7, 1936, when the Judge then presiding over the Circuit Court of DeKalb county entered a notation on his docket - cause stricken under Rule 7. Notice further transpired until November 9, 1936, when appellants filed their motion to vacate the order striking the cause from the docket, and to reinstate same. The court denied the motion and this appeal follows:

Rule 7 of the Circuit Court of DeKalb County is as follows:

> "Hereafter, on the call of the docket, both law and chancery, all old cases remaining thereon, in which nothing action has not been taken, and no steps made for trial or final disposition at the term due- ing three years next preceding such call, may be dismissed or stricken from the docket at at the costs of the plaintiff or complain- ant, as the case may be. The fact that any case has been placed on the trial docket

It is urged by appellants that the order made striking the case from the docketwas not equivalent to a dismissal thereof for want of prosecution. In this respect they cite Frederick V. Savings Bank, et al., 106 Ill. 147. It is there held that an appeal will lie only from a final judgment or decree, that an order striking the suit from the docket is not of itself a final order or decree, and an appeal will not lie therefrom. It will be observed that Rule 7 contemplates the entry of a judgment at the time a cause is dismissed or stricken from the docket, by providing that such dismissal shall be, "at the costs of the plaintiff or complainant, as the case may be."

Courts have inherent power, in the interest of justice, to dismiss suits for want of prosecution, but an order of dismissal to be final for purposes of appeal, must ordinarily be embodied in a judgment. Freeman on Judgments (5th ed. vol. 1, sec. 23).

An appeal will not lie from an order of such a character, as there is no final judgment entered. Harvey v. Cochran, 103 Ill. App. 576; First Trust, etc., Bank v. Cutler, 286 Ill. App. 6. It has been said that under such circumstances, a court of review will of its own motion dismiss the appeal. Barber v. Wood, 318 Ill. 415.

Various reasons are advanced by appellants in support of their contention that the court should have granted the motion to reinstate the case. Many reasons are also advanced by appellees as to why the court should not have granted such motion, among which is that of laches. The record discloses that a demurrer to the bill of complaint had been filed and argued, taken under advisement by the Chancellor, and that no disposition thereof had ever been made prior to the order complained of herein. Delay due to the necessity for judicial deliberation cannot be charged against a litigant as laches and should not be permitted to work an injustice. The majority of this court is of the opinion that the motion to redocket the cause should have been granted.

This case is therefore reversed and remanded with directions for the trial court to grant the motion of appellants to redocket the cause. Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(73815—5M—3-32)

9v31

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

294 I.A. 617 2

BE IT REMEMBERED, that afterwards, to-wit: On MAR 10 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9231 Agenda No. 5

In the Appellate Court of Illinois

Second District

October Term, A. D. 1937.

H. H. Antrim,

Appellee,

vs.

Walter C. Pfender, Executor of the Last Will and Testament of Margaret Caldwell, deceased,

Appellant,

Appeal from the Circuit Court of Stephenson County

DOVE, P. J.

On August 7, 1934, plaintiff filed in the county court of Stephenson County his claim in the sum of $11, 500.00 against the estate of Margaret Caldwell, deceased, for services rendered by him to the deceased. The claim was denied by the county court and an appeal was prosecuted to the Circuit Court where a hearing was had before the court and a jury. At the close of the evidence on the part of the claimant, the jury, in obedience to a peremptory instruction returned a verdict of not guilty. Thereafter, upon the motion of the claimant, the verdict of the jury was set aside and a new trial granted. From that order the executor of the last will and testament of Margaret Caldwell, deceased, filed in this court his petition for leave to appeal. This petition for leave to appeal, together with a statement, brief and argument and an abstract of record, was filed in this court on April 26, 1937 and an order entered granting the executor leave to appeal. Thereafter an additional abstract and a statement, brief and argument on behalf of appellee were filed and on October 4th, 1937 a reply brief and argument on behalf of appellant was filed and the cause so submitted at the October Term, 1937.

Rule three of this court provides that if the petition for leave to appeal is granted, thecase shall be deemed to be pending

Gen. No. 9231

In the Appellate Court of Illinois

Second District

October Term, A. D. 1937.

H. H. Antrim,

Appellee,

vs.

Walter G. Prendergast, Executor of the Last Will and Testament of Margaret Caldwell, deceased,

Appellant,

DOYLE, P. J.

On August 7, 1936, plaintiff filed in the county court of Stephenson County his claim in the sum of $3,500.00 against the estate of Margaret Caldwell, deceased, for services rendered by him to the deceased. The claim was denied by the county court and an appeal was prosecuted to the circuit court where a hearing was had before the court and a jury. At the close of the evidence on the part of the claimant, the jury, in obedience to a peremptory instruction returned a verdict of not guilty. Thereafter, upon the motion of the claimant, the verdict of the jury was set aside and a new trial granted. From that order the executor of the last will and testament of Margaret Caldwell, deceased, filed in this court his petition for leave to appeal. This petition for leave to appeal, together with a statement, brief and argument and an abstract of record, was filed in this court on April 16, 1937 and an order entered granting the petitioner leave to appeal. Thereafter an additional abstract and a reply brief and argument on behalf of appellee were filed and on October 14, 1937 a reply brief and argument on behalf of appellant was filed and the cause so submitted at the October Term, 1937.

Rule three of this court provides that if the petition for

on appeal, and briefs shall be filed in this court as provided by our rules. The parties, however, are given the option of submitting the case upon the petition and answer or either party may file a further brief as in other cases pending on appeal. Rule eight of this court provides that the abstract furnished by appellant must be sufficient to present fully every error relied upon. In the instant case pages five to twenty-seven of the record appear on a portion of page three of the abstract as follows, viz:

"5 Demand for jury trial.
6 Placita, December Term, A.D. 1935.
7 Motion to dismiss.
8-9 Affidavit in support of motion to dismiss.
10 Order overruling motion to dismiss.
11 Placita, June Term, A. D. 1936.
12-13 Plea.
14 Reply to plea.
15-16 Motion to dismiss.
17 Order overruling motion to dismiss.
17 Empaneling jury.
17 Tuesday, July 7, 1936. Trial.
18 Wednesday, July 8, 1936. Trial.
19-20 Amended Claim.
21 Motion by defendant at close of plaintiff's evidence to find defendant not guilty.
22-23 Instruction by court at close of plaintiff's evidence to find defendant not guilty.
24 Verdict.
25 Placita, September Term, A. D. 1936.
26-27 Motion for newtrial".

vIt will be noted that this index refers to a plea and reply to plea, to an amended claim, to a motion to find defendant not guilty, to an instruction to find defendant not guilty and to a verdict, yet none of these are found in this portion of the abstract. Under our procedure in a case of this character, the claim and the objection to the allowance thereof make up the issue and just what the plea and reply set forth can not be determined from the abstract, nordoes it appear anywhere that the claim was ever objected to. Furthermore, the abstract fails to set forth any verdict of the jury or to show that any verdict was ever returned, and if a verdict of not guilty was directed and was returned it would not be responsive to the issue made by the amended claim assuming it was objected to by appellant. On page six of the abstract

on appeal, and briefs shall be filed in this court as provided by our rules. The parties, however, are given the option of submitting the case upon the petition and answer or either party may file a further brief as in other cases pending on appeal. The right of this court provides that the decision rendered by appellate may be sufficient to present fully every error relied upon. In the instant case pages five to twenty-seven of the record appear as a portion of page three of the abstract is follows, viz:

"5 Demand for jury trial.
6 Placita, December Term, A.D. 1926.
7 Motion to dismiss.
8-9 Affidavit in support of motion to dismiss.
10 Order overruling motion to dismiss.
11 Placita, June Term, A. D. 1926.
12-13 Plea.
14 Reply to plea.
15-16 Motion to dismiss.
17 Order overruling motion to dismiss.
18 Impaneling jury.
19 Tuesday, July 7, 1926. Trial.
19-20 Verdict.
21 Motion by defendant to close of plaintiff's evidence to find defendant not guilty.
22-23 Instruction by court at close of plaintiff's evidence to find defendant not guilty.
24 Verdict.
25 Placita, September Term, A. D. 1926.
25-27 Motion for mistrial."

It will be noted that this index refers to a plea and reply to plea, to an amended plea, to a motion to find defendant not guilty, to an instruction to find defendant not guilty and to a verdict, yet none of these are found in this portion of the abstract. Under our procedure in a case of this character, the plea and the objection to the sufficiency thereof raise the issue for trial, the plea and reply set forth can not be disregarded from the abstract, because it appears somewhere that the plea was replied to. Furthermore, the motion of this to set aside verdict of the jury or to show that only verdict was given returned, and if a verdict of not guilty was directed one was returned it would not be responsive to the issues made by the pleadings. Also it was

eppears the following: "29--order granting new trial." Nowhere in the abstract is this order abstracted nor at the conclusion of the abstract does the name of counsel for appellant appear, although Rule ten of this court provides that the name of counsel filing the abstract shall appear at the conclusion thereof.

Our rules also provide how the brief of appellant shall be constructed and provides that the concluding subdivisions of the statement of the case shall be a brief statement of the errors relied upon for reversal. The order which appellant seeks to have reversed is the order granting a new trial and the error relied upon for reversal is the sustaining of appellee's motion for a new trial and the refusal of the trial court to render judgment on the verdict. Under our rules, in the instant case, it seems to us that it would have been appropriate for counsel to have stated briefly at the conclusion of his statement the reason why the giving of his peremptory instruction was warranted and why it was error for the trial court not to render judgment on the verdict. While we do not think the abstract or statement furnished this court by counsel for appellant a model or that they fully comply with our rules, we do not believe we would be justified in dismissing the appeal or affirming the order of the trial court for that reason alone.

The amended claim of appellee recited that there was due claimant from the estate of Margaret Caldwell the sum of $5000.00 for services rendered by him to the deceased in carefully looking after her business interests. The evidence discloses that Dr. S.W. Caldwell, the husband of Margaret Caldwell, died testate in 1900; that in September, 1908, she stated to Miss Gray, an intimate friend, that some time prior to his death, her husband, Dr. Caldwell, had requested her, that if she survived her husband, she should leave the claimant $5000.00 "for what he had done for them". This witness further discloses that on September 26, 1908 Margaret Caldwell

did execute a will, the fourth clause of which is as follows:

> "I was directed by my deceased husband, Dr. W. S. Caldwell, to bequeath to Henry H. Antrim, if he shall have carefully looked after my business interests, the sum of five thousand dollars, and I, therefore, on account of the valuable services rendered me do hereby give and bequeath to said Henry H. Antrim the sum of five thousand dollars".

The evidence further discloses that on June 17, 1932, Margaret Caldwell executed her last will and testament, which was duly admitted to probate and which expressly revoked all former wills executed by her and by this instrument no bequest or devise was made to appellee. Some three hundred forty-three letters written by Margaret Caldwell to claimant were identified and marked as exhibits but were not offered in evidence by appellee.

Counsel for appellee contend that clause four of the will of Margaret Caldwell, dated September 26, 1908, together with her statements to Miss Gray, her intimate friend, are conclusive evidence of a pre-existing indebtedness due from the deceased to the claimant for services theretofore rendered the deceased by the claimant, that such provision in her will was not a gift or bequest without consideration but an admission by her that the sum of $5000.00 was due claimant, upon her death, for compensation for services theretofore rendered Margaret Caldwell; that by executing the instrument which contained the clause heretofore set out, Mrs. Caldwell made an admission against her interests that claimant had carefully looked after her business interests and had earned, at the time the instrument was executed, the sum of $5,000.00 and that therefore the relationship of debtor and creditor between Margaret Caldwell and the claimant existed at the time the admission was made and such status is presumed to continue unless the contrary is shown; that the contrary was not shown and therefore the evidence, together with all presumptions that may be reasonably drawn therefrom tends to prove that claimant was employed by the deceased to look after her business interests; that he did so to her satisfaction; that he was to receive therefor

$5,000.00 upon her death; that he has not been paid and that the trial court therefore erred in directing a verdict in favor of the estate.

Counsel for appellant insist that the testimony and clause four of the 1908 will hereinbefore referred to fails to prove that Margaret Caldwell acknowledged herself indebted to claimant for services rendered by him prior to 1908 and that the only inference that can be drawn therefrom is that there was at one time a disposition upon the part of Margaret Caldwell to make claimant an object of her bounty; that she thereafter changed her mind as she had a right to do and that inasmuch as the evidence failed to establish any agreement on the part of Margaret Caldwell and claimant as set forth in the amended claim which forms the basis of this action, the trial court properly directed a verdict and erred in not rendering judgment thereon. Counsel also insist that the will of 1908 was a privileged communication and no portion of it should have been admitted in evidence and argue that in order to recover against the estate, the evidence must be clear and convincing and that evidence of admissions made by a person since dead, should be carefully scrutinized as such evidence is liable to abuse.

Upon the hearing the court admitted in evidence clause four of the will of 1908 but sustained the objection of counsel for appellant to the introduction of the entire instrument. We do not think the trial court erred in so doing. The other portions of this instrument were immaterial, threw no light on the issue being tried and the only reason why clause four and the evidence showing the signature of the deceased thereto was admissible, is that they constitute an admission against her interest and for that purpose in our opinion, this portion of the will of 1908 was competent. Nor do we think there is any merit in appellant's contention that this will was a privileged communication. Miss Gray's

$5,000.00 upon her death; that he has not been paid and that the trial court therefore erred in directing a verdict in favor of the estate.

Counsel for appellant insists that the testimony and claims four of the 1908 will hereinbefore referred to fails to prove that Margaret Caldwell acknowledged herself indebted to claimant for services rendered by him prior to 1909 and that the only inference that can be drawn therefrom is that there was at one time a liaposition upon the part of Margaret Caldwell to make claimant an object of her bounty; that she thereafter changed her mind as she had a right to do and that inasmuch as the evidence failed to establish any agreement on the part of Margaret Caldwell and claimant as set forth in the amended claim which forms the basis of this action, the trial court properly directed a verdict and erred in not rendering judgment thereon. Counsel next give insist that the will of 1908 was a privileged communication and no portion of it should have been admitted in evidence and error that in order to recover against the estate, the evidence must be clear and convincing and that evidence of admissions made by a person since dead, should be strictly scrutinized in each evidence is liable to abuse.

Upon the hearing the court admitted in evidence clause four of the will of 1908 but sustained the objection of counsel for appellant to the introduction of the entire instrument. We do not think the trial court erred in so doing. The other provisions of this instrument were immaterial, threw no light on the issue being tried and the only reason why clause four of the evidence showing the signature of the deceased thereto was admissible is that they constitute an admission against interest and for that purpose in our opinion, this portion of the will of 1908 was competent. Nor do we think there is any merit in appellant's contention that this will was a privileged communication. Since Mary's

testimony discloses that Margaret Caldwell told her about this same instrument and disclosed to her the contents of that will insofar as they effected appellee. Whether the statement made by Margaret Caldwell to Miss Gray or her admissions in her will are more consistent with an intention on her part to make appellee a gift rather than be construed as an obligation on her part to pay appellee for services he claims to have rendered her, is a question that does not arise on this appeal. From all the evidence in this record and the condition of the record as disclosed by appellant's abstract, we are unable to say that the trial court abused its discretion in sustaining appellee's motion for a new trial and that order will therefore be affirmed.

ORDER AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court. in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(73815—5M—3-32)

9239

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

294 I.A. 617 3

BE IT REMEMBERED, that afterwards, to-wit: On MAR 10 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9239

Agenda No. 8

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1937

73 A

G. C. Wilson,

Appellant

v.

Henry W. Person and Ruth Person,

Appellees,

and

David Carlson Roofing Co., a Corporation,

Appellee.

Appeal from the Circuit Court of Winnebago County.

DOVE, P.J.

On June 6, 1936, G. C. Wilson filed his complaint in the Circuit Court of Winnebago County, in which he alleged that on June 27, 1931 Henry W. Person and Ruth Person executed their promissory note, for the principal sum of $300.00 payable to the order of the National Lenders' Corporation of Indiana, with interest thereon at the rate of two and one-half per cent per month from date until paid, that the said note was duly endorsed by the National Lenders' Corporation of Indiana to Personal Finance Company of Rockford, Illinois, that to secure the payment of said note, the makers thereof, Henry W. Person and Ruth Person, on the same date, made and executed their chattel mortgage conveying certain household furniture to the said National Lenders' Corporation. The complaint then alleged that the mortgagors were in default in paying the amount of principal and interest as provided by the note, that the Personal Finance Corporation of Rockford, Illinois had endorsed the note in writing to G. C. Wilson, the plaintiff, and that by reason thereof the defendants became liable to pay the plaintiff the sum of $283.16 as principal, and $275.48 as

Gen. No. 9239

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1937

G. C. Wilson,

Appellant

v.

Henry W. Person and Ruth Person,

Appellees,

and

David Carlson Roofing Co., a
Corporation,

Appellee.

Appeal from the Circuit
Court of Winnebago County.

DOYLE, P.J.

On June 8, 1936, G. C. Wilson filed his complaint in the Circuit Court of Winnebago County, in which he alleged that on June 17, 1931 Henry W. Person and Ruth Person executed their promissory note, for the principal sum of $300.00 payable to the order of the National Lenders' Corporation of Indiana, with interest thereon at the rate of two and one-half per cent per month from date until paid, that the said note was duly endorsed by the National Lenders' Corporation of Indiana to Personal Finance Company of Rockford, Illinois, that to secure the payment of said note, the makers thereof, Henry W. Person and Ruth Person, on the same date, made and executed their certain mortgage conveying certain household furniture to the said National Lenders' Corporation. The complaint then alleged that the mortgagors were in default in paying the amount of principal and interest as provided by the note, that the Personal Finance Corporation of Rockford, Illinois had endorsed the note in writing to G. C. Wilson, the plaintiff, and that by reason thereof the defendants became liable to pay the plaintiff the sum of $322.50 as principal, and $173.40 as

interest. The complaint prayed that the defendants Henry W. Person and Ruth Person be directed and decreed to pay the said amount of the principal and interest, and that in default thereof the property be sold by the Sheriff of Winnebago County, Illinois under the direction of the court. Attached to the complaint was a copy of the note and chattel mortgage.

On August 3, 1936 David Carlson Roofing Company filed an intervening petition in which it alleged that on April 8, 1931, in the Circuit Court of Winnebago County, it obtained a judgment against Henry W. Person for $866.04 and costs of suit, that an execution was taken out on said judgment and placed in the hands of the Sheriff of Winnebago County and that the same became a lien on all the personal property of the defendant Henry W. Person, including the property described in this mortgage, that thereafter and on July 1, 1936 the defendant Henry W. Person and Ruth Person, his wife, turned over the possession of the articles mentioned in the chattel mortgage to them as evidenced by a bill of sale which was duly filed and recorded in the Recorder's Office of Winnebago County, Illinois on July 6, 1936. The said Intervening Petition prayed that the court enter an order vacating and setting aside its order directing the Sheriff to take possession of the above mentioned goods and prayed for an order upon the sheriff to turn over the possession of the goods to the intervenor.

The plaintiff, G.C. Wilson, filed his answer to the intervening petition denying that the judgment and execution of intervenor against Henry W. Person constituted a lien on the furniture of the said Henry W. Person, alleged that there was no consideration given Henry W. Person and Ruth Person for the conveyance by them of the said personal property, that the said conveyance was made after the intervening petitioner had notice of the foreclosure proceeding instituted by Wilson against Henry W. Person and Ruth Person and that the conveyance was, therefore, a nullity and fraudulent and void as to plaintiff. The abstract of record does not disclose that any answer was filed by Henry W. Person

interest. The complaint prayed that the defendants Henry H. Iverson and Ruth Iverson be directed and decreed to pay the said amount of the principal and interest, and that in default thereof the property be sold by the Sheriff of Winnebago County, Illinois under the direction of the court. Attached to the complaint was a copy of the note and chattel mortgage.

On August 3, 1938 David Carlson Moving Company filed an intervening petition in which it alleged that on April 8, 1931, in the Circuit Court of Winnebago County, it obtained a judgment against Henry H. Iverson for $858.04 and costs of suit, that an execution was taken out on said judgment and placed in the hands of the Sheriff of Winnebago County and that the same became a lien on all the personal property of the defendant Henry H. Iverson, including the property described in this mortgage, that thereafter and on July 1, 1938 the defendant Henry H. Iverson and Ruth Iverson, his wife, turned over the possession of the articles mentioned in the chattel mortgage to them as evidenced by a bill of sale which was duly filed and recorded in the Recorder's office at Winnebago County, Illinois on July 6, 1938. The said Intervening Petition prayed that the court enter an order vacating and setting aside the order directing the Sheriff to take possession of the afore mentioned goods and prayed for an order upon the sheriff to turn over the possession of the goods to the intervenor.

The plaintiff, O.O. Wilson, filed his answer to the intervening petition denying that the judgment and execution of intervenor against Henry H. Iverson constituted a lien on the furniture of the said Henry H. Iverson, alleged that there was no consideration given Henry H. Iverson and Ruth Iverson for the conveyance by them of the said personal property, that the said conveyance was made after the intervening petitioner had notice of the foreclosure proceeding instituted by Wilson against Henry H. Iverson and Ruth Iverson and that the conveyance was, therefore, a nullity and fraudulent and void as to plaintiff. The abstract of record does not disclose that any answer was filed by Henry H. Iverson

and Ruth Person to the original complaint or to the intervening petition. Upon a hearing before the Chancellor a decree was entered finding that the chattel mortgage was not properly acknowledged, had never been recorded and was therefore void as to the intervenor, and that by virtue of its bill of sale, the intervenor was the sole owner of the property in question. The Chancellor rendered a money judgment in favor of the plaintiff and against the Persons for $558.64 and costs and directed the Sheriff to deliver possession of the property to the intervenor, David Carlson Roofing Company. From this decree G. C. Wilson has prosecuted this appeal.

From the pleadings and the evidence, it appears that the David Carlson Roofing Company obtained a judgment against Henry W. Person on April 8, 1931 for $866.04, that an execution was issued thereon but no execution was outstanding at the time appellant filed its complaint on June 6, 1936. On June 27, 1931 Henry W. Person and Ruth Person borrowed from the National Lenders' Corporation $300.00, executing their note for that amount and securing the payment of the same by a chattel mortgage upon their household furniture. This note and chattel mortgage thereafter became the property of appellant. The mortgage was never properly acknowledged and was never recorded. On July 1, 1936 the amount due from the Persons to the Roofing Company amounted to $1,093.32 and in consideration of that amount the Persons executed and delivered to the Roofing Company their bill of sale conveying to it practically the same items of household furniture described in the chattel mortgage which they signed on June 27, 1931. This bill of sale was properly acknowledged and recorded in the recorder's office of Winnebago County on July 6, 1936.

Counsel for appellant contends that inasmuch as he had instituted proceedings to foreclose his chattel mortgage on June 6, 1936 and this suit was pending at the time appellee acquired title to the household furniture on July 1, 1936, that the doctrine of lis pendens applies and that appellee took title with full notice of appellant's rights under his chattel mortgage. In support of this contention, appellant calls our attention to the cases of McCauley v. Rogers, 104 Ill. 578

and duly forwarded to the original complaint or to the intervening petition. Upon a hearing before the Chancellor a decree was entered finding that the chattel mortgage was not properly acknowledged, had never been recorded and was therefore void as to the intervenor, and that by virtue of its bill of sale, the intervenor was the sole owner of the property in question. The Chancellor rendered a money judgment in favor of the plaintiff and against the defendant for $858.84 and costs and directed the sheriff to deliver possession of the property to the intervenor, David Carlson Roofing Company. From this decree C. C. Wilson has prosecuted this appeal.

From the pleading and the evidence, it appears that the David Carlson Roofing Company obtained a judgment against Henry W. Person on April 8, 1931 for $656.04, that an execution was issued thereon but no execution was outstanding at the time appellant filed its complaint on June 6, 1936. On June 27, 1931 Henry W. Person and Nora Person borrowed from the National Lumbers' Corporation $300.00, executing their note for that amount and securing the payment of the same by a chattel mortgage upon their household furniture. This note and chattel mortgage thereafter became the property of appellant. The mortgage was never properly acknowledged and was never recorded. On July 1, 1936 the amount due from the vendee to the Roofing Company amounted to $1,093.32 and in consideration of that amount the Persons executed and delivered to the Roofing Company their bill of sale covering to it practically the same items of household furniture described in the chattel mortgage which they signed on June 27, 1931. This BILL of sale was properly acknowledged and recorded in the recorder's office of Winnebago County on July 6, 1936.

Counsel for appellant contends that inasmuch as he had instituted proceedings to foreclose his chattel mortgage on June 6, 1936 the suit was pending at the time appellee acquired title to the household furniture on July 1, 1936, that the doctrine of lis pendens applies and that appellee took title with full notice of appellant's rights under his chattel mortgage. In support of this contention, appellant

and Reid, Murdock and Company v. Sheffy, 75 Ill. App. 136, and states that "an exact parallel case" is Francis v. Bridges, 152 Ill. App. 630. We have examined these cases and in our opinion the facts in those cases are clearly distinguishable from the facts in the instant case.

In the McCauley case, supra, it appeared that a bill to foreclose a chattel mortgage executed by James McCauley, a then resident of Rook County, was filed in the Superior Court of Cook County on January 10, 1881, and McCauley was duly served with process, a hearing was had and in May, 1881 the cause was referred to the Master to state an account. On July 22, 1881, McCauley confessed a judgment in the Circuit Court of LaSalle County in favor of Lena M. McCauley. On November 2, 1881, the Master's report in the foreclosure suit pending in Cook County was confirmed and a decree of foreclosure rendered and thereafter the Master sold the property to the mortgagees. On November 8, 1881 an execution was issued upon the Lena McCauley judgment and on November 26, 1881 the property which had been sold to the mortgagees under the decree of November 2, 1881 was sold to Lena McCauley and William A. Funk, both of whom had actual notice of the foreclosure decree, On December 28, 1881,the complainants in the foreclosure proceeding who had purchased the property at the Master's sale not having obtained possession of the property which they had purchased obtained from the Circuit Court a rule upon Lena McCauley and W. A. Funk to show cause why a writ of assistance should not issue. Upon a hearing the writ was directed to issue and in affirming the judgment of the Appellate Court which affirmed the order of the Circuit Court, the Supreme Court stated that the foreclosure decree found that when the bill to foreclose the chattel mortgage was filed the mortgagees had a valid lien upon the property described in the chattel mortgage, that the purchasers at the execution sale, prior to that sale, were served with a copy of the foreclosure decree and had actual notice of the rights of the mortgagees as found by that decree, that they knew the mortgagees had a valid lien on the

and Reid, Murdock and Company v. Sheffy, 75 Ill. App. 158, and states that "an exact parallel case" is Francis v. Bridges, 182 Ill. 629. We have examined these cases and in our opinion the facts in those cases are clearly distinguishable from the facts in the instant case.

In the McCauley case, supra, it appeared that a bill to foreclose a chattel mortgage executed by James McCauley, a then resident of Rock County, was filed in the Superior Court of Cook County on January 10, 1881, and McCauley was duly served with process, a hearing was had and in May, 1881 the cause was referred to the Master to state an account. On July 22, 1881, McCauley confessed a judgment in the Circuit Court of LaSalle County in favor of Jane E. McCauley. On November 3, 1881, the master's report in the foreclosure suit pending in Cook County was confirmed and a decree of foreclosure rendered and thereafter the Master sold the property to the mortgagee. On November 8, 1881 an execution was issued upon the LaSalle County judgment and on November 26, 1881 the property which had been sold to the mortgagee under the decree of November 3, 1881 was sold to Jane McCauley and William V. Funk, both of whom had actual notice of the foreclosure decree. On December 28, 1881, the complainants in the foreclosure proceeding who had purchased the property at the Master's sale not having obtained possession of the property under they had purchased obtained from the Circuit Court a rule upon Jane McCauley and W. A. Funk to show cause why a writ of assistance should not issue. Upon a hearing the writ was directed to issue and in affirming the judgment of the Appellate Court which affirmed the order of the Circuit Court, the Supreme Court stated that the foreclosure decree found that when the bill to foreclose the chattel mortgage was filed the mortgagees had a valid lien upon the property described in the chattel mortgage, that the purchasers at the execution sale, prior to that sale, were served with a copy of the LaSalle county judgment and had actual notice of the rights of the mortgagees in Cook County that they knew the mortgagees had a valid lien on the

property and that the property had been decreed to be sold in satisfaction of a valid debt, secured by a prior lien. "Knowing these facts", continued the court in its opinion, "the purchase by them is to be treated as if it never had any existence. They had no right to attempt to obstruct the enforcement of a decree of a court of equity and they can take nothing by their purchase." In the Reid, Murdock and Company case, supra, McCauley v. Rogers, supra, is cited and it was held that the doctrine of lis pendens applies to personalty as well as real property and that when a court has jurisdiction of the subject matter of a chancery suit, a person not named as a defendant may voluntarily enter his appearance in the proceeding and thus confer jurisdiction of his person upon the court.

In Francis v. Bridges, supra, a bill to foreclose a chattel mortgage executed by W. H. Bridges to J.T. Francis upon a team of horses was filed in the Circuit Court of Massac County on October 7, 1908 and service was had on Bridges the following day. On October 9, 1908, Bridges took the horses out of Massac County into Johnson County, where they were levied upon the same day in order to satisfy a judgment confessed by Bridges that day in favor of O. R. Morgan. At the execution sale, Morgan purchased the horses and thereafter sold them to Joe Sanders. Subsequently a decree of foreclosure was rendered finding that the filing of the bill and service of summons on Bridges constituted a lien on the property in favor of Francis. The decree also found the amount due Francis and directed the Master to sell the mortgaged property unless the amount so found due was paid within ten days. Thereafter a writ of assistance was issued by the Circuit Court commanding Sanders to deliver the horses in controversy to the officer of the court upon demand therefor. In affirming that order, the court held that the mortgagee did not lose his lien under his mortgage which became due October 1, 1908 as he had attempted to take possession in apt time thereafter but Bridges refused to give the horses up. The court further held that by filing his bill and obtaining service upon Bridges before the rights of Morgan or Sanders intervened, the lien of the mortgagee was preserved.

The facts in the instant case are clearly distinguishable from the

The facts in the instant case are clearly distinguishable from the

facts in these cases relied upon by appellant. Here the chattel mortgage sought to be foreclosed was executed to secure the payment of a note dated June 27, 1931 and which had long since matured. The chattel mortgage was also executed on June 27, 1931. The complaint to foreclose was filed June 6, 1936. Just when service was had upon the Persons does not appear from the abstract of record. An inspection of the complaint and the copy of the chattel mortgage thereto attached would disclose that the instrument sought to be foreclosed had never been acknowledged as provided by Statute and never had been recorded. It was null and void as to the Roofing Company and the filing of a complaint to foreclose it could not give it any validity so far as this appellee was concerned.

Our rules provide how the brief of appellant should be constructed by this rule has not been followed and the abstract of record is woefully insufficient and for these reasons we would be justified in either dismissing the appeal or affirming the decree. Gyure v. The Sloan Valve Company, 367 Ill. 489; Bedinger v. May, 323, Ill. 187; Shaw v. Davis, 289 Ill. App. 447. The decree appealed from will be affirmed.

DECREE AFFIRMED.

affirmed.

Chew v. Davis, 189 Ill. App. 447. The decree appealed from will be

Sloan Valve Company, 287 Ill. 459; Dedinger v. Ray, 285, Ill. 139;

either dismissing the appeal or affirming the decree. Cyrus v. The

fully insufficient and for these reasons we would be justified in

by this rule has not been followed and the abstract of record is mis-

this appellee was concerned.

Our rules provide how the brief of appellant should be construed

It was null and void as to the Hosting Company and the filing of a complaint to foreclose it would not give it any validity so far as

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of the complaint and the copy of the chattel mortgage therein attached

the records does not appear from the abstract of record. An inspection

to foreclose was filed June 6, 1930. That such service was not upon

obattel mortgage was also executed on June 27, 1921. The complainant

mortgage sought to be foreclosed was executed to secure the payment

of a note dated June 27, 1921 and which had long since matured. The

foote in these cases relied upon by appellant. Here the chattel

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(73815—5M—3-32)

9v64

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

294 I.A. 6174

BE IT REMEMBERED, that afterwards, to-wit: On MAR 10 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9264 Agenda No. 20

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1937.

Bertha Schafer, Charles Schafer and Amelia M. Schafer,

Appellants

v.

Lorette Robillard and Amos H. Robillard,

Appellees.

Appeal from the Circuit Court of Kankakee County.

DOVE, J.

The complaint in this cause was filed on February 11, 1937 by Bertha Schafer, Charles Schafer and Amelia Schafer and consists of two counts. The first count alleged that the plaintiff Charles Schafer, on January 3, 1900, acquired a certain particularly described tract of land situated in the City of Kankakee, which he thereafter and on November 12, 1924 conveyed to the plaintiff Amelia M. Schafer. The count then avers that on October 23, 1929 the said Amelia M. Schafer conveyed said premises to the plaintiff Bertha Schafer, who, it is alleged, claims the premises in fee simple. It is then charged that while the plaintiffs were so possessed thereof, the defendants on or about May 1, 1926 unlawfully entered upon said premises and have occupied the same from thence hitherto and that they now unlawfully withhold from the plaintiff Bertha Schafer possession thereof. The second count alleges that the plaintiff Charles Schafer, on January 3, 1900, by warranty deed acquired title to the premises described in this count from Emery Cobb, that he immediately took possession thereof, enclosed the same with a fence and that he and his grantees have been in possession thereof from the day he so acquired title. It is then alleged that on April 18, 1909 the said Charles

Gen. No. 9264 Agenda No. 50

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1927.

Bertha Sobater, Charles Sobater
and Amelia M. Sonater,

Appellants

v.

Appeal from the Circuit Court
of Lawrence County.

Lorette Robillard and Rose E.
Robillard,

Appellees.

DOVE, J.

The complaint in this cause was filed on February 11, 1927, by Bertha Sobater, Charles Sobater and Amelia Sobater, as executors of two counts. The first count alleged that the plaintiff Charles Sobater, on January 3, 1900, acquired a certain particularly described tract of land situated in the City of Lawrence, which he thereafter and on November 15, 1904 conveyed to the plaintiff Amelia M. Sobater. The count then avers that on October 10, 1907 the said Amelia M. Sobater executed said premises to the plaintiff Lorette Sobater, who, it is alleged, claims the premises in fee simple. It is then charged that while the plaintiffs were so possessed thereof, the defendants on or about May 1, 1926 unlawfully entered upon said premises and have occupied the same from thence hitherto and that they now unlawfully withhold from the plaintiff Bertha Sobater possession thereof. The second count alleges that the plaintiff Charles Sobater, on January 3, 1900, by warranty deed acquired title to the premises described in this count from Perry Cliff, that by inadvertence said possession thereof, conveyed the same with a force and effect to said his grantees have been in possession thereof from the to recover title. It is then alleged that on April 12, 1926 the said Charles

Schafer conveyed the east two hundred and twenty-five feet of the premises which he had so acquired from Cobb to one Emma Anderson, who, on April 11, 1916 conveyed the same to Amos H. Robillard, who, on September 9, 1923, conveyed the same to Lorette Robillard. This count then charges that the said Lorette Robillard and the said Amos H. Robillard have occupied said premises from the time of their acquiring the same and that they are still occupying the same. This count then alleged that the said Emery Cobb was the owner of all of the lands lying south of Cobb Boulevard and extending eastward to the east city limits of the City of Kankakee, and that after executing the deed to the plaintiff Charles Schafer on January 3, 1900, he, the said Cobb, conveyed, on March 31, 1903, to Lizzie La Bounty the land immediately east of the land which he had conveyed to the said Charles Schafer. This count then alleges that the east line of the land conveyed to Charles Schafer has always been regarded as the western boundary of the La Bounty land and is the present western boundary of the La Bounty Subdivision. It is then alleged that on March 11, 1926 the said Amos H. Robillard filed a bill in the Circuit Court of Kankakee County to quiet the title to the east fifty-two and five-tenths feet of the east two hundred twenty-five feet, which he alleged he had acquired by the Emma Anderson conveyance and that in that proceeding a decree was rendered quieting the title thereto in the said Amos H.Robillard and that by so doing he, the said Amos H. Robillard, established as the east line of the land purchased by Charles Schafer from Emery Cobb the line which is now the western boundary of the LaBounty Subdivision. The count then alleges that the defendant Lorette Robillard and her husband Amos Robillard now unlawfully claim the east two hundred thirty-five feet of the land acquired by Charles Schafer from Emery Cobb, instead of the east two hundred twenty-five feet as described in the deed from Charles Schafer to Emma Anderson. It is then alleged that Charles Schafer, on November 12, 1924, conveyed all of the land acquired by him from Emery Cobb, except the east two hundred twenty-five feet thereof to Amelia M. Schafer, who, on August

Schafer conveyed the east two hundred and twenty-five feet of the premises which he had so acquired from Cobb to one Emma Anderson, who, on April 11, 1916 conveyed the same to Anna H. Robillard, who, on September 9, 1923, conveyed the same to Lorette Robillard. Plaintiff then charges that the said Lorette Robillard and the said Anna H. Robillard have occupied said premises from the time of their acquiring the same and that they are still occupying the same. This count then alleged that the said Emery Cobb was the owner of all of the lands lying south of Cobb Boulevard and extending eastward to the east city limits of the City of Kankakee, and that after conveying the land to the plaintiff Charles Schafer on January 3, 1903, he, the said Cobb, conveyed, on March 31, 1903, to Lizzie La Bounty the land immediately east of the land which he had conveyed to the said Charles Schafer. This count then alleges that the east line of the land conveyed to Charles Schafer has always been regarded as the western boundary of the La Bounty land and is the present western boundary of the La Bounty Subdivision. It is then alleged that on March 11, 1926 the said Anna H. Robillard filed a bill in the Circuit Court of Kankakee County to quiet the title to the east fifty-two and five-tenths feet of the east two hundred twenty-five feet, which he alleged he had acquired by the Emma Anderson conveyance and that in that proceeding a decree was rendered quieting the title thereto in the said Anna H. Robillard and that by so doing he, the said Anna H. Robillard, relocated as the east line of the land purchased by Charles Schafer from Emery Cobb the line which is now the western boundary of the La Bounty Subdivision. The count then alleges that the defendants Lorette Robillard and her husband Anna Robillard now unlawfully claim the east two hundred thirty-five feet of the land acquired by Charles Schafer from Emery Cobb, instead of the east two hundred twenty-five feet as described in the deed from Charles Schafer to Emma Anderson. It is then alleged that Charles Schafer, on November 11, 1926, conveyed all of the land acquired by him from Emery Cobb, except the east two hundred twenty-five feet thereof to Amelia M. Schafer, who, on January

23, 1929, conveyed the same to Bertha Schafer and that by virtue of these conveyances Bertha Schafer is now the owner of the premises in fee simple. The count then describes the tract in controversy, being the same premises as described in the first count, and alleges that Amos H. Robillard and Lorette Robillard, on or about May 1, 1926, unlawfully entered into possession of this strip of land which lies immediately west of the tract purchased by Amos H. Robillard from Emma Anderson. It is then charged that the Robillards erected a garage and chicken house on a portion of this ten foot strip and have occupied the same and thereby deprived the plaintiff, Bertha Schafer, of the possession, use and enjoyment of the same. This count asks judgment for the possession of this ten foot strip, that the defendants be ordered to remove their buildings and other possession therefrom and that the defendants be decreed to pay to the plaintiffs a reasonable rental for the use of said premises.

The defendants Lorette Robillard and Amos H. Robillard filed an answer in which they denied that Charles Schafer acquired from Emery Cobb the land described in the complaint, denied the conveyance by Charles Schafer to Amelia Schafer and denied that Amelia Schafer conveyed said premises to Bertha Schafer, denied that Bertha Schafer has a fee simple title to the premises described and denies that the defendants unlawfully entered the premises and denies that they withhold possession thereof from the plaintiff Bertha Schafer. As to the second count the answer denied that Emery Cobb conveyed the land east of the Schafer tract to Lizzie La Bounty and denied that the east boundary line of the Schafer tract had always been regarded as the west boundary of the La Bounty Sub-division. By their answer these defendants denied that they unlawfully claim the ten foot strip of land in controversy and denied that they unlawfully entered into possession thereof and allege that the plaintiffs and defendants all claim title from a common source, namely Emery Cobb. That Emery Cobb conveyed to Charles Schafer,on January 3, 1900, the premises described in their answer, that said Charles Schafer,on April 19, 1909, conveyed the same premises

that said Charles Schafer,on April 19, 1909, conveyed the same premises Schafer,on January 3, 1900, the premises described in their answer, common source, namely Henry Cobb. That Henry Cobb conveyed to Charles and alleges that the plaintiffs and defendants all claim title from a veray and denied that they unlawfully entered into possession thereof denied that they unlawfully claim the two foot strip of land in controv- boundary of the La Bounty Sub-division. By their answer these defendants boundary line of the Schafer tract had always been regarded as the west of the Schafer tract to Illegia La Bounty and denied that the east second count the answer denied that Henry Cobb conveyed the land east hold possession thereof from the plaintiff Bertha Schafer. As to the defendants unlawfully entered the premises and denied that they with- has a fee simple title to the premises described and denies that the veyed said premises to Bertha Schafer, denied that Bertha Schafer Charles Schafer to Amelia Schafer and denied that Amelia Schafer con- Cobb the land described in the complaint, denied the conveyance by

The defendants Lorette Robillard and Amos H. Robillard filed an answer in which they denied that Charles Schafer acquired from Henry

defendants be decreed to pay to the plaintiffs a reasonable rental for to remove their buildings and other possession therefore and that the the use of said premises.

possession, use and enjoyment of the same. This court asks judgment for the possession of this ten foot strip, that the defendants be ordered the same and thereby deprived the plaintiff, Bertha Schafer, of the chicken house on a portion of this ten foot strip and have destroyed Anderson. It is then charged that the Robillards erected a garage and immediately west of the tract purchased by Amos H. Robillard from Same unlawfully entered into possession of this strip of land which like Amos H. Robillard and Lorette Robillard, on or about May 1, 1908, the same premises as described in the first count, and alleges that the count then describes the tract in controversy, being fee simple. The count then describes the tract in controversy, being these conveyances Bertha Schafer is now the owner of the premises in 23, 1929, conveyed the same to Bertha Schafer and that by virtue of

to Emma Anderson and that the said Emma Anderson, on April 11, 1916, conveyed the same to the defendant Amos H. Robillard and that thereafter the said Amos H. Robillard conveyed the west half of the east 225 feet of said premises to Lorette Robillard. The answer then alleges that whatever title the plaintiffs claim was acquired by erroneous description and after title was vested in the defendant Lorette Robillard from a common source and avers that the defendants and their grantors have had title to the premises in question for a period of more than twenty-five years, having acquired said title directly from Charles Schafer.

A jury was waived and the cause submitted to the court for determination and at the conclusion of the evidence offered on behalf of the plaintiffs, the court sustained the motion of the defendants and rendered judgment in favor of the defendants, dismissing the complaint at the costs of the plaintiffs. To reverse this judgment, an appeal has been prosecuted to this court.

It is apparent from the pleadings, and counsel for both parties in their respective briefs state, that this is an ejectment proceeding to determine the ownership of a rectangular strip of ground lying on the south side of Cobb Boulevard, said strip of land being ten feet in width east and west and four nundred two feet north and south, and extending from the south side of Cobb Boulevard to low water mark of the north bank of the Kankakee River in the City of Kankakee.

Section 3 2 of Chap. 37, Ill. Rev. Stat. 1937 provides, among other things, that the Appellate courts of this state shall have jurisdiction of all matters of appeal from the final judgments of Circuit Courts in any suit or proceeding at law other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute. Said section further provides that appeals from the final judgments of circuit courts shall lie directly to the Supreme Court in all criminal cases and in cases involving a franchise or freehold or the validity of a statute. Sec. 75 of the Civil Practice Act (Chap. 110, Ill. Rev. Stat. 1937) provides that appeals shall be taken directly to the Supreme Court in all cases in

to Emma Anderson and that the said Emma Anderson, on April 11, 1916, conveyed the same to the defendant Amos H. Robillard and that thereafter the said Amos H. Robillard conveyed the west half of the east 225 feet of said premises to Lorette Robillard. The answer then alleges that whatever title the plaintiffs claim was acquired by erroneous description and after title was vested in the defendant Lorette Robillard from a common source and they aver that the defendants and their grantors have had title to the premises in question for a period of more than twenty-five years, having acquired said title directly from Charles Sawyer.

A jury was waived and the cause submitted to the court for determination and at the conclusion of the evidence offered on behalf of the plaintiffs, the court sustained the motion of the defendants and rendered judgment in favor of the defendants, dismissing the complaint at the costs of the plaintiffs. To reverse this judgment, an appeal has been prosecuted to this court.

It is apparent from the pleadings, and counsel for both parties in their respective briefs state, that this is an adversary proceeding to determine the ownership of a rectangular strip of ground lying on the south side of Cobb Boulevard, said strip of land being ten feet in width east and west and from minimum two feet north and south, and extending from the south side of Cobb Boulevard to low water mark of the north bank of the Kankakee river in the City of Kankakee.

Section 8 2 of Chap. 37, Ill. Rev. Stat. 1937 provides, among other things, that the Appellate courts of this state shall have jurisdiction of all matters of appeal from the final judgment of Circuit Courts in any suit or proceeding at law other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute. Said section further provides that appeals from the final judgments of Circuit Courts shall lie directly to the Supreme Court in all criminal cases and in cases involving a franchise or freehold or the validity of a statute. Sec. 75 of the Civil Practice Act (Chap. 110, Ill. Rev. Stat. 1937) provides that appeals shall be taken directly to the Supreme Court in all cases in

which a franchise or freehold or the validity of a statute or a construction of the constitution is involved.

In this proceeding Bertha Schafer claims to be the fee simple owner of the premises involved herein and charges that the defendants unlawfully took possession thereof and are unlawfully occupying the same and are unlawfully withholding possession thereof from her. The answer of the defendants deny that Bertha Schafer is the owner of the premises and aver that whatever title she may have was acquired by an erroneous description after title thereto had become vested in Lorette Robillard and that the defendants and their grantors have had title thereto for more than twenty-five years. These pleadings therefore put in issue a freehold and this court is without jurisdiction of the subject matter of this controversy. Daily v. Boudreau, 135 Ill. App. 488, same case 231 Ill. 228. Where the question between the parties is one involving title to lands, a freehold is necessarily involved and the only order the Appellate Court is justified in entering is, under the statute, to transfer the cause to the Supreme Court. Eastman v. Littlefield, 164 Ill. 254.

It is true that to give the Supreme Court jurisdiction of a direct appeal a freehold must be directly and not collaterally, contingently or incidentally involved and the necessary result of the litigation must be that either one party gains and the other party loses a freehold estate, or the title must be so put in issue that the outcome of the case requires a decision as to the ownership of the real estate in question. Burroughs v. Kotz, 226 Ill. 40; Wright v. Logan, 364 Ill.33.

In the instant case the parties hereto make adverse claims to the title to the real estate in controversy, which is described in the complaint. Counsel correctly designate the proceeding as one in ejectment and the issue presented for determination involves title to lands and this appeal should therefore have been taken directly to the Supreme Court.

This cause will be transferred to the Supreme Court.

CAUSE TRANSFERRED.

which a franchise or freehold or the validity of a statute or a construction of the constitution is involved.

In this proceeding Bertha Schuster claims to be the fee simple owner of the premises involved herein and charges that the defendants unlawfully took possession thereof and are unlawfully occupying the same and are unlawfully withholding possession thereof from her. The answer of the defendants duly puts Bertha Schuster in the same [illegible] premised and avers that whatever title she may have had [illegible] erroneous description after title thereto had passed vested in Imogene Hobilard and that the defendants and their grantors have been [illegible] thereto for more than twenty-five years. These pleadings therefore [illegible] in issue a freehold and it is quite [illegible] of the subject matter of this controversy. Selig v. Hunting, 126 Ill. 418, same case 23 Ill. 456. Where the pleading before the Court it does involving title to lands, a freehold is conclusively involved and the only order the Appellate Court is justified in entering is, under the statute, to transfer the cause to the Supreme Court. Lawson v. Little Field, 164 Ill. 197.

It is true that to give the Supreme Court jurisdiction of a [illegible] appeal a freehold must be directly and not collaterally, incidentally or incidentally involved and the necessity results or the litigation must be that either one party [illegible] and the other party [illegible] a freehold estate, or the title must be in [illegible] the decree of the court in the case requires a decision as to the ownership of the real estate in question. Thompson v. Rose, 208 Ill. 11; Trials v. Logan, 208 Ill. 22

In the instant case the parties claim adverse title to the title to the real estate is questionable, which is necessary in the complaint. Counsel correctly [illegible] the proceeding is one to eject- ment and the issue presented for determination involves title to lands and this appeal should therefore have been taken directly to the Supreme Court.

This cause will be transferred to the Supreme Court.

Clerk Appellate Court.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court. at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(73815—5M—3-32)

Opinion filed Jan 17, 1938
Petition for Rehearing denied
Abstract April 5 1938
60R

Published in Abstract

154A

Alvin W. Ahrens, Trustee, etc., Plaintiff and Appellee, v. Caroline C.Lutz, et al, Defendants and Appellees, Montgomery Ward & Co., Inc., Intervenor and Appellee, and Kline Brothers Co., a corporation, Defendant and Appellant.

Appeal from Circuit Court, Logan County.

294 I.A. 618

October Term, A. D. 1937.

Gen. No. 9092 **Agenda No. 19**

Mr. Justice Fulton delivered the opinion of the court.

In this case a Bill for Partition was filed by the Appellee, Alvin W. Ahrens, Trustee, and the appeal is taken from a decree entered in the Circuit Court of Logan County, on July 6, 1937, wherein it was adjudged and decreed that the Appellant, Kline Brothers Co., a corporation, was unlawfully in possession of real estate in the City of Lincoln, Illinois; that the Appellee, Montgomery Ward & Co., was entitled to possession of said real estate and ordering the Appellant to surrender possession of said real estate to Montgomery Ward & Co.

The facts show that the premises in controversy were a store building located in Lincoln, Illinois. John A. Lutz, Sr., owner of said premises died testate, December 7, 1924, leaving Caroline C. Lutz, his wife, Edward C. Lutz, Caroline Bramwell, Marian L. Gordon and John A. Lutz, Jr., his four children. By his will he devised all his real estate to his wife for life, with remainder at her death to the said four children. The Appellant, Kline Brothers Co., originally went into possession of the real estate in question under a lease from the said Caroline C. Lutz, dated February 24, 1931, for a term beginning May 1, 1931, and expiring July 31, 1936. The lease contained the following provision:

"Fourth. And Lessee shall have and is hereby given the right, at its option, to extend the terms of this lease from the 1st day of August A. D. 1936, to the 31st day of July A. D. 1941, such option to be exercised by giving Lessor notice in writing of its intention to exercise said option not later than the

1st day of May, A. D. 1936, at a rental of Two hundred dollars ($200.00) per month. * * *

"The notice hereinabove in this and in the preceding paragraphs mentioned shall be deemed sufficient if the same be sent by registered United States mail, addressed to Lessor at the address where the last previous month's rent shall have been paid."

The life tenant, Caroline C. Lutz, died May 1, 1936. At which time the remainder vested the possession in her four children. During the last two or three years of her life her son, John A. Lutz, Jr., transacted business for her, collected the rent from said store building, and applied the checks in payment upon an $18,000.00 mortgage upon the premises. During the lifetime of Caroline C. Lutz, her agent, John A. Lutz, Jr., had some discussion with Percy W. Davidson, manager of the store of Appellant with a view to extending or continuing in force the said lease for the additional term of five years ending July 31, 1941. No agreement or meeting of the minds resulted from these negotiations. On April 15, 1936, the Kline Company mailed a letter to John A. Lutz, Jr., submitting a new lease for five years which called for a rental of $150.00, a month. This lease was returned to the Kline Company by Lutz with the information that the terms contained therein were not satisfactory. Later the Kline Company again wrote Mrs. Lutz requesting that the lease be signed or that she draw up new leases for the entire building at $175.00, per month and send them to the Appellant with her signature attached so that they might sign such leases and return them to her. On May 1st, 1936, the Kline Company again wrote Mrs. Lutz asking if she was preparing new lease forms. This letter was written on the day that Mrs. Lutz died and John A. Lutz Jr., wrote at the bottom of said letter stating that his mother had passed away and saying, "We are willing to negotiate with Mr. Kline as to the future rental, but the terms of the lease submitted are not satisfactory."

After the death of Caroline C. Lutz, the checks for rent for the months of May, June and July were received by John A. Lutz Jr., as agent, and were duly endorsed and applied in payment upon the mortgage indebtedness. Further correspondence passed back and forth between the Kline Company and John A. Lutz, Jr., concerning the lease of the property in controversy but never at any time was any agreement reached. On June 25, 1936, the Kline Company wrote

to John A. Lutz, Jr., stating that on August 1st, 1936, they would commence to pay rent at the rate of $200.00, per month. In the meantime, John A. Lutz, Jr., and the other owners of the property had entered into a lease with Montgomery Ward & Co., dated May 28, 1936, for a 30 year term commencing August 1st, 1936. On July 2nd, 1936, they notified the Kline Company that the owners considered that the Kline lease would expire on July 31, 1936, and that they expected the Kline Company to surrender possession by that date. The Kline Company refused to surrender possession of the property on August 1st, 1936, and have continued in possession since that time. On July 13, 1936, upon the application of the Appellee, Albert A. Ahrens was duly appointed Receiver for the premises and continues to act as such. The rentals collected by the Receiver were held by him subject to the order of the Court.

On January 20, 1937, Montgomery Ward & Co., a corporation, filed an intervening petition claiming that the rights of Kline Bros. Company had expired under its lease and claiming right to possession under a lease to-wit, from the remainder men owners and the Plaintiff trustee, and praying leave to become an Intervening Petitioner. On January 26, 1937, the Kline Bros. Company filed its supplemental answer claiming rights as tenants under an extension of the original lease until July 31, 1941. The cause was referred to a Special Master in Chancery who found that Montgomery Ward & Co., were entitled to possession; that the Kline Company was unlawfully withholding possession and should be decreed to surrender such possession forthwith to Montgomery Ward & Co. Exceptions to the findings of the Special Master in Chancery were overruled by the Circuit Court and the decree entered in accordance with the recommendations and findings of the Special Master in Chancery.

It is urged by the Appellant that the trial court erred in finding that the Kline Bros. Company did not exercise its option to extend the original lease on or before May 1, 1936; and in not finding and decreeing that the oral negotiations and the letters between the Kline Bros. Company and John A. Lutz, Jr., constituted a waiver of the written notice of the exercise of said option to extend said lease on or before May 1st, 1936, and in failing to find that Kline Bros. Company were in lawful possession of said premises under such extension of the original lease. From a careful read-

ing of the testimony and an examination of the documentary proof we fail to find any evidence which even tends to show that the Kline Bros. Company exercised its option to extend said lease on or before May 1st, 1936. It has been uniformly held by our courts that where a written lease gives to the Lessee an option to extend the terms by notice to the Lessor on or before a certain date, such notice must be given by the date specified, to entitle the Lessee to the extension. *Fuchs* v. *Peterson,* 315 Ill. 370. *Dikeman* v. *Sunday Creek Coal Co.,* 184 Ill. 546. The same cases are authority for the principle of law that the notice of election to extend the term of the lease must indicate the unconditional and unqualified acceptance by the Lessee of the offer contained in the option. It can hardly be contended in this case that there was any notice, either oral or written, given by the Lessee of its desire to exercise the option under the terms specified in the lease at any time before May 1, 1936. The statement by John A. Lutz, Jr., after the death of the life tenant that the owners were willing to negotiate with Mr. Kline as to future rental but that the terms of the lease submitted were not satisfactory, coupled with the acceptance of rent during the months of May, June and July, being the balance of the term created by the life tenant, did not in any manner revive the option which the lease required to be exercised, in a definite manner on or before May 1, 1936, and by written notice. Nor do we see anything in the words, acts or conduct of the remainder men in this case which could be construed as a waiver of written notice. The option provided for in the lease executed by the life tenant expired with her death on May 1st, 1936. After that date it was within the power of the parties to make a contract providing for the extension of the lease or for a new one, but their action in accepting rent for the balance of the term was in itself in no wise a renewal of the option contained in the original lease. Since the option had expired on May 1st, 1936, there was no concrete offer in existence which could be waived by act of the parties and certain it is that no new modified or definite agreement was reached between the Kline Company and the owners after May 1st, 1936. The case of *Fuchs* v. *Peterson,* Supra, is not authority for the waiver contended for by the Appellant in this case. In that case the Lessee had an option to extend his lease for a five year term by

a notice in writing to the Lessor prior to a certain date. Long before that date had arrived the Lessee went with his attorney to see the Lessor and stated to him that he wanted to give notice to the Lessor that the Lessee was exercising his option to extend the lease and asked the Lessor if it would be necessary to give further notice. The Lessor stated that no further notice would be necessary. Under those circumstances it was proper for the jury to find on the issue of fact that the requirement for written notice by the Lessee was waived. The other cases cited by counsel for Appellant in support of a waiver are as readily distinguished from the facts in this case.

The contention of the Appellant that the court erred in ordering a writ of restitution of said premises in favor of Montgomery Ward & Co., cannot be considered on this appeal because no objection was made when the Appellee, Montgomery Ward & Co., sought to come into this partition suit by intervening petition and the question cannot be raised for the first time in this court. For the same reason any objection to the relief granted to Montgomery Ward & Co., on their intervening petition must be regarded as waived. *Miller* v. *Akin,* 350 Ill. 186.

Finding no error in the decree of the Circuit Court of Logan County the same is hereby affirmed.

Affirmed.

(Six pages in original opinion.)

IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

m #25 Oct Term 1937 Agenda # 31

LENA WOLF, Plaintiff-Appellant, vs. EMIL HOHLT, HERMAN HOHLT, and ALFRED FRIEDERICH, Defendants-Appellees.	Appeal from Order of Circuit Court of St. Clair County, Illinois, dismissing complaint of Lena Wolf, Plaintiff-Appellant. ----- Honorable Maurice V. Joyce, Judge Presiding.

STONE, J. 294 I.A. 618

This is an appeal from a decree of the Circuit Court of St. Clair County, Illinois, dismissing for want of equity a complaint filed by Lena Wolf to compel the former administrator and the distributees of the estate of Matilda Anderson, deceased, to account to the plaintiff as a creditor of the estate of Matilda Anderson.

The complaint alleged that, during her lifetime, Matilda Anderson was indebted to the plaintiff in the sum of $8200.00 for services; that Matilda Anderson died July 25, 1934, and letters of administration on her estate issued out of the Probate Court of St. Clair County to the defendant, Alfred Friederich; that subsequent to the adjustment term, but prior to the expiration of the year of administration, the plaintiff filed her claim in the Probate Court; that the Clerk of the Probate Court did not issue any summons to the administrator, and as a result neither the administrator nor his attorney were advised of the filing of the claim; that the plaintiff was not advised of the Clerk's failure to issue the summons; that on October 21, 1935, final settlement of the estate was approved, although no action had been taken on the plaintiff's claim; that final distribution was made to the defendants, Emil Hohlt, Herman Hohlt, and Edgar Hohlt, the aggregate of which far exceeded the amount of the plaintiff's

[illegible]

[illegible]

[illegible]

claim; and that plaintiff is without remedy except in a court of equity. Plaintiff prayed an adjudication of her claim and an accounting.

On June 24, 1936, the plaintiff had filed a petition in the Probate Court to reopen the estate for the purpose of hearing the claim. The estate was ordered reopened and a hearing was set for July 7, 1936. On July 9, 1936, a hearing was had. The Probate Court made a finding that it had no jurisdiction to hear the claim and allowed a motion to dismiss the petition to reopen the estate.

Plaintiff did not appeal from the order of the Probate Court denying jurisdiction of the claim, but filed her complaint as set forth on November 18, 1936.

Appellant contends that equity has jurisdiction to relieve against a judgment of the Probate Court approving final settlement of an estate on the ground of fraud, accident or mistake; that the failure of the Clerk to issue summons as aforesaid was an accident within the meaning of this rule; and that the order of the Probate Court denying jurisdiction is not res adjudicata of the matters in this suit.

The cases of ANDERSON v. ANDERSON, 178 Ill. 160; COLLINS v. KINNARE, 89 Ill. App. 236; HARRIGAN v. STONE, 230 Ill. App. 413, and UNION TRUST CO. v. SHOEMAKER, 258 Ill. 564, are cited as examples of the jurisdiction of equity to relieve against final settlements obtained by fraud, accident, or mistake. These cases differ from the record before us. In the ANDERSON case there was an actual fraud by which a guardian unjustly took credit for a payment of $5000.00 that had not been made and the fraud was discovered long afterward. In the COLLINS case the plaintiff was an heir who had had no notice of the administration until after distribution. In HARRIGAN v. STONE, supra, the administrator's fraudulent assertion of individual title to property which was an asset of the estate was not discovered until

long after final settlement. In the UNION TRUST CO. case the plaintiff's claim had been contingent and did not become absolute until long after the distribution.

Equity requires an extraordinary case to justify assumption of jurisdiction in administration of estates: DOUGHERTY v. HUGHES, 165 Ill. 384; HARDING v. SHEPARD, 107 Ill. 264; STRAUS v. PHILLIPS, 189 Ill. 9, on 27; PATTERSON v. PATTERSON, 251 Ill. 153, on 180. In the STRAUS case the court held that procurement of an appointment as administrator by a fraudulent claim that appointee was a creditor did not present such an extraordinary case that equity ought to take jurisdiction of the administration of the estate. In our opinion this principle justified the action of the Circuit Court in dismissing the bill.

Appellant contends that the order of the Probate Court denying jurisdiction was not res adjudicata of the matters in this suit. We think that the order had the effect of a final disposition of the claim, and that if it was erroneous there was a remedy by way of appeal. HARDING v. SHEPARD, 107 Ill. 264; SIMPSON v. SIMPSON, 273 Ill. 90.

There is a further consideration which we think justified the Circuit Court in dismissing this bill for want of equity. No satisfactory explanation is offered for the failure of the claimant to follow up the issuance of a summons to the administrator. While it has been held (WALLACE v. GATCHELL, 106 Ill. 315) that the summons need not be issued within the time allowed for filing claims in order to confer jurisdiction on the Probate Court to hear the claim, it should be noted that in that case there had been no distribution at the time claimant sought an adjudication of the matter. Counsel point out that the statute requires the Clerk of the Probate Court to issue summons upon the filing of a claim after adjustment day. Notwithstanding this requirement it could hardly have been the intention of the legislature to require the Clerk to deliver the summons to the

Sheriff and to see that service was actually obtained. There was a lapse of sixteen months between the filing of this claim and the next step of the claimant in the pursuit of the matter, that is, the petition to reopen the estate. A court of equity will not relieve against a judgment obtained through accident or mistake where it is largely the result of the negligence of the party seeking relief. MILLER v. BARTO, 247 Ill. 104, on 108, 109.

The foregoing considerations lead us to the conclusion that plaintiff is not entitled to relief and that the Circuit Court did not err in dismissing the complaint for want of equity.

The decree of the Circuit Court of St. Clair County is accordingly affirmed. Affirmed.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MAY TERM, A.D. 1937.

Term No. 2 Agenda No. 5

L.V.KNEPPER and E.E.CORNWELL,
Plaintiffs (Appellees),

vs.

SECURITY INSURANCE COMPANY OF NEW HAVEN, CONNECTICUT, a corporation,
Defendant (Appellant).

Appeal from Circuit Court, Marion County.

294 I.A. 618

Murphy, J:

May 14, 1930 the defendant insurance company issued an insurance policy insuring plaintiff Cornwell's buildings and personal property against loss by fire for a period of five years. Plaintiff Knepper held a mortgage on the real estate upon which the buildings were located and a rider to cover his interest was attached to the policy.

July 30, 1934 the house, barn and some of the personal property described in the policy were destroyed by fire.

Plaintiffs instituted this suit on the policy to recover the amount of said loss. A trial resulted in a verdict and judgment in favor of the plaintiff for $2223.50. Defendant's motions for a judgment notwithstanding the verdict or in the alternative for a new trial were filed and overruled.

The policy provision was that if a loss by fire occured, the owner should within 60 days render the insured a subscribed, sworn statement setting forth his knowledge and belief as to the time and origin of the fire, the interest of the insured and others in the property, the cash value of each item and the amount of the loss.

Plaintiff did not make such proof of loss but alleged that on the 31st day of July 1934 plaintiff Cornwell notified N. Faber, agent of the defendant, of the loss and that adjuster, A.E.Meyers, employed by the defendant investigated the facts concerning the fire, ascertained description of the real and personal property and its ownership, the amount of loss and damage to the property and that he, Meyers, told the plaintiff Cornwell, that the defendant company would take no action in regard to settlement of the claim for the reason that the origin of the fire was under investigation by the State Fire Marshall, "that the said adjuster told plaintiff, E.E. Cornwell, that further notice or action by the plaintiff would not be necessary as he, the defendant's agent and adjuster, had all the facts concerning the property damaged and the amount of loss claimed."

Defendant's answer denied the agency of Faber and the facts alleged in reference to the waiver but did not deny the agency of Meyers, the fire adjuster. Many other matters were pleaded as defenses but the part above referred to will serve as a basis for a discussion of defendant's first contention.

The evidence discloses that the plaintiff, Cornwell, applied to N.J.Faber for insurance, he paid Faber the premium and Faber procured the policy in question and delivered it to him. Immediately after the fire Cornwell telephoned Faber and Faber sent Elmer Browning. Browning was an insurance solicitor and no claim is made that he had any authority to represent the defendant. After visiting the scene of the fire Browning returned to Faber's office, made out a notice of the fire loss and mailed it to the defendant on a blank form which he testified was furnished Faber by the defendant. A few days thereafter, Aug. 14, Meyers, a fire insurance adjuster, called on Cornwell and stated to him that before he could make an investigation Cornwell would have to sign a non-waiver agreement. Cornwell

signed the same in triplicate. This instrument provided that it was mutually agreed between Cornwell and the insurance company, "that any action taken by said party of the second part in investigating the cause of fire or investigating and ascertaining the amount of loss and damage to the property of the party of the first part caused by fire alleged to have occured on July 30th, 1934, shall not waive or invalidate any of the conditions of the policy of the second part, held by the party of the first part, and shall not waive or invalidate any rights whatsoever of either of the parties of this agreement.

The intent of this agreement is to preserve the rights of all parties hereto and provide for an investigation of the fire and the determination of the amount of the loss or damage, without regard to the liability of the party of the second part."

It appears conclusively that Meyers was an agent of the defendant company. Plaintiff testified as to a conversation he had with Meyers on this visit in which he says Meyers told him what he would have to do, he said he would have to make a list of all the articles that were burned, have a carpenter figure the house and barn and the cost it would take to replace them and as soon as the State completed its investigation of the fire, possibly ten days or two weeks, "they would call for this list, the adjuster and that they would not do anything until the investigation was made."

Plaintiff further testified that he caused a carpenter to make an estimate of the losses on the buildings and that he made a list of the items of personal property and the value of the same. Both exhibits were identified and introduced in evidence. He also stated that Meyers did not come for the list.

Plaintiff Cornwell also testified that in the latter part of August 1934 he saw Faber in the bank at Montrose and that he asked Faber what he should do about the fire loss and that Faber said "There isn't nothing you can do until the State gets through

with their investigation and he said possibly that would not take long and that he had notified the company and done all he could do and he said there was no reason why I would not get a settlement within a reasonable length of time," and that acting on that statement he did nothing further.

Plaintiff's evidence as to these two conversations was not contradicted.

The rule is settled in this State that an insurance company, may, through its agent, waive proof of loss without the use of express words. This may be done by his acts and conduct inconsistent with an intention to enforce the strict compliance with the conditions of the policy, which conduct is calculated to lead the insured to believe that the company did not intend to require such compliance. Fray vs. National Ins. Co. 341 Ill. 431, Citizens Ins. Co. vs. Stoddard 197 Ill. 330, Milwaukee Mechanics' Ins. Co. vs. Schallman 188 Ill. 213.

Defendant contends that the non-waiver agreement should be given the effect of nullifying the purported statements of Meyers. We cannot agree with that contention for the agreement expressly states that it only refers to matters rising out of the insurance investigation of the cause of fire or the amount of loss and that in making such investigation it shall not be deemed a waiver of any of the provisions of the policy.

According to Cornwell's evidence, the adjuster, as an agent of the company, required that plaintiff furnish more proof than was required by the terms of the policy and also directed the method of delivering it to the company contrary to the provisions of the policy. Where an agent induces the insured to believe that a strict compliance with the conditions of the policy as to proof of loss would not be demanded, the furnishing of such is deemed to have been waived. Fray vs. National Fire Ins. Co., supra.

The complaint alleged waiver by the acts of Meyers. After verdict and judgment the court granted plaintiffs leave to

amend their complaints by alleging waiver of proof of loss by Faber. As already stated the record establishes the waiver by Meyers whose agency is not denied and even though Faber's agency was not proven, which it is not necessary for us to decide, there is sufficient evidence of waiver in the record to sustain the verdict.

Complaint is made of the court's refusal to give Defendant's instruction No. 12. The refused instruction stated that mere silence in regard to the furnishing of proof of loss is not to be taken as waiver. The uncontradicted evidence was that statements were made by adjuster Meyers and the case was not tried on the theory that there was nothing said by the adjuster and therefore the instruction was not applicable.

Defendant's final contention is the court erred in overruling his motion for a continuance on the grounds of the absence of the witness Faber. The affadavit filed in support of the motion falls far short of meeting the requirements of an affadavit for continuance as announced in innumberable decisions of the Courts of Review of this State.

The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1937.

Term No. 14 — Agenda No. 2

GEORGE NOVACIC and
LOUISE NOVACIC,
Plaintiffs-Appellants,

vs.

CLYDE ALLEN,
Defendant-Appellee.

Appeal from the Circuit Court of St. Clair County, Illinois.

77A

294 I.A. 6184

Murphy, J:

George Novacic and Louise Novacic instituted this suit to recover $3850. which it is alleged the defendant, Clyde Allen, obtained from them by deceit and false representations made in the negotiations and making of a contract for the conveyance of three lots located in the Village of Fairmont City. The defendant owned the lots and the consideration of $3850. was to be paid in monthly payments. The contract was dated in 1931.

Defendant filed a motion the first part of which was to dismiss the suit and the latter for judgment on the insufficiency of the pleadings. The court sustained the motion to dismiss and entered judgment in bar of plaintiffs' actio and for costs. This appeal is from that judgment.

The motion to dismiss the suit was based upon the grounds that the action was barred by a prior judgment in a suit in which the defendant, Allen, was plaintiff and the Novacics were defendants. A copy of the judgment

was attached to the motion as an exhibit. It is in form a mere memorandum from which a judgment could be written. It sets forth the names of the parties that defendants (Novacics) motion to dismiss is allowed and suit is dismissed because plaintiff has an adequate remedy at law that there is no basis for an accounting or a decree or a specific performance or to remove a cloud on title and that the bond for deed is not a mortgage and cannot be pleaded as such. Judgment was entered against plaintiff for costs.

Plaintiffs' complaint in the former suit and defendant's motion upon which the purported judgment was entered were not before the trial court in this case. Defendant by additional praecipe has caused them to be included in the record in this court but since they were not before the trial court they cannot be considered on this appeal.

Under the practice as it existed prior to the adoption of the Civil Practice Act a party relying upon a previous adjudication as a bar was required to set it up by plea or answer. Mettler vs. Warner 243 Ill. 600, Svalina vs. Saravana 341 Ill. 236 but under Section 48 of the Civil Practice Act previous adjudication as a bar to an action may be raised by motion. Par. 2 of Supreme Court Rule 13 provides that in pleading a judgment decree or order of a court it shall be sufficient to state the date of its entry and describe its general nature and allege generally that the judgment or decision was duly given or made.

Said section and rule changes the manner of pleading a prior judgment in bar but they do not change the rule of law as to what is essential to be shown before a judgment or a decree could operate as a bar to an action. The rule is that it must appear on the face of the record or be shown by extrinsic evidence that the precise question being litigated was raised and determined in the former suit. Svalina vs. Saravana, supra, Gouwens vs. Gouwens 222 Ill. 223, Sawyer vs. Nelson 160 Ill. 629.

The general allegation in defendant's motion that the cause of action was barred by a prior judgment is but a conclusion of the pleader. Svalina vs. Saravana, supra. There is nothing in the exhibit or the motion that identifies the subject matter of the prior action with the matters sought to be litigated in the present suit nor is there anything shown from which it could be determined that the issues adjudicated in the former suit are the same or similar as the ones tendered by plaintiffs' complaint in the present action. The motion to dismiss should have been overruled.

That part of defendant's motion in which he asks judgment on the pleading alleges that the complaint was insufficient in law because it did not allege facts showing a fiduciary relationship and that plaintiffs' action could not be maintained unless such relationship was shown and that the statements alleged by the plaintiffs to have been false were as to matters in the future or mere expressions of opinions and that a copy of the contract for sale should have been attached as an exhibit.

The facts alleged in the complaint bearing upon the relationship of the parties are that the plaintiffs are uneducated, unable to read or write the English language, can speak it only with difficultly, that plaintiff, George Novacic, is over 60 years of age and is a common laborer, that Louise Novacic, his wife, has always been engaged in her duties as a housewife, that for a long time prior to the making of the contract in question in 1931, defendant had acted as their financial adviser, aided them in regard to their investments, counseled with them relative to their family expenses, advised them as to real estate values in Fairmont City, that they relied upon defendant in the execution of legal papers and signed this contract when told to do so by the defendant and that because of said trust and confidence they acted solely and entirely upon his counsel and advice.

Confidential relations exist wherever confidence is reposed and accepted and the one has it in his power, in a secret manner, for his own advantage to sacrifice those interests of the other which he is bound in honor and good conscious to protect. 1 Story Eq. Jur. 323. In general it exists where trust and confidence are reposed by one person in another who as a result gains an influence and superiority over the first. Pulfrey vs. Wid 340 Ill. 553, Duncan vs. Dazey 318 Ill. 500, Niland vs. Kennedy 316 Ill. 253.

In Suchy vs. Hajicek 364 Ill. 502 the court said, "In particular, where, by reason of kinship, business association, disparity in age, or by physical or mental condition, or other reason, the grantee is in an especially intimate position with regard to the grantor and the latter reposes a high degree of trust and confidence

in the former, a confidential relationship may be said to exist."

For the purposes here the facts pleaded must be taken as true and are in our opinion sufficient to show that the plaintiffs were reposing confidence in the defendant, trusting to his judgment as to valuations of real estate, execution of papers and their investments and that defendant accepted that confidence and by means thereof he dealt with the plaintiffs to their loss and to his own advantage. Such facts establish a fiduciary relationship.

It is further alleged in the complaint that the defendant represented to the plaintiffs that the three lots which he was selling to them had an actual value of $3850. that the purchase of them by the plaintiffs would constitute a safe investment that he would refund to them the amount of their money whenever requested by plaintiffs. It is alleged that he also represented as an existing fact that the State of Illinois and the United States Government had made final arrangements for a four lane highway which would include a part of these lots and that the part of the lots not taken would by reason of said highway be greatly enhanced in value, that said representations were untrue and known by defendant to be so. The plaintiff in ignorance of their falseness and having confidence in him paid him $3850. for the lots which were not worth to exceed $1200.

In view of the fiduciary relationship that existed between the parties the complaint stated a cause of action.

The further contention that plaintiff should have attached a copy of the contract to the complaint is without merit. Section 36 of the Civil Practice Act provides that

whenever an action defense or counterclaim is founded upon a written instrument a copy thereof or so much of the same as is relevant must be attached as an exhibit or recited therein. This action is not founded upon the terms of the contract but arises out of the fraud and deceit alleged to have been practiced by the defendant in getting the plaintiffs into the contract. Defendant's motion should have been overruled.

Judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1937.

Term No. 15 Agenda No. 30

ELIZABETH A. HOLLIDAY,
Plaintiff-Appellee,

vs.

JAMES T. HOLLIDAY,
Defendant-Appellant.

Bill for Separate Maintenance.

Appeal from the Circuit Court of St. Clair County, Illinois.

JAMES T. HOLLIDAY,
Plaintiff-Appellant,

vs.

ELIZABETH A. HOLLIDAY
Defendant-Appellee.

Cross Bill for Divorce.

78A

294 I.A. 619

Murphy J:

On May 15, 1935 Elizabeth Holliday filed her complaint for separate maintenance against her husband, James T. Holliday. The complaint alleged their marriage on August 23, 1898, their living together and cohabitation until March 1, 1935 at which time the defendant abandoned the plaintiff. It was alleged that there was two children born of the marriage both of legal age, that defendant had been unkind and cruel to plaintiff for ten years prior to the separation. It was also alleged that at the time of the separation March 1, 1935 the defendant struck the plaintiff and that on the 2nd of May, 1935 defendant instituted a divorce in the State of Tamaulipas in the Republic of Mexico and had caused a process issued out of the Mexican court to be served upon plaintiff. Defendant's

residence was alleged to be in St. Clair County and by his answer he admitted it, admitted that they had trouble March 1, 1935 and that he slapped plaintiff but denied he struck her as charged. Admitted he filed the suit in Mexico and alleged it was legal and had resulted in a decree for divorce before the summons was served in the instant case. Several months after the answer was filed defendant filed a cross complaint for divorce on the grounds of desertion. The allegations in the complaint and answer in reference to the Mexican suit were abandoned by both parties and before decree was entered were stricken by the court.

Temporary alimony and solicitor's fees were allowed but no question is raised as to those items. Upon a hearing the court found for the plaintiff on the separate maintenance charge, allowed her alimony of $50. per month, a $100. solicitor's fees and dismissed defendant's counterclaim for want of equity. Defendant has appealed from that decree and urges as grounds for reversal that the evidence does not support the separate maintenance charge, that if it has been proven by a preponderance of the evidence that the allowance of alimony and solicitor's fees are excessive and that the decree does not allege facts sufficient to support the finding.

The evidence shows that plaintiff and defendant resided in O'Fallon for many years, that he was engaged in coal mining and that through their accumulations they purchased certain farm land, that in 1927 they moved to Washington, where their daughter resided, and that for three and a half years defendant operated a shoe store there, that in 1931 they returned to O'Fallon and lived together until March 1, 1935.

Plaintiff suffered a stroke of paralysis in 1924 and thereafter she was in a weakened physical condition with high blood pressure and unable to work. It appears that for several years during the latter part of their cohabitation defendant contributed very little to plaintiff's support and there is some evidence that the food supply was insufficient.

Both parties concede that their trouble on March 1, 1935 started in a conversation about a tenant on one of the farms. Plaintiff claims she did nothing to aggravate the attack, and that defendant struck her several blows, defendant's version is that plaintiff made a remark derogatory to his ability to manage the farm land and that he thought the law imposed a heavy penalty for striking one wearing glasses and that he was about to remove her glasses so he could slap her face and that in so doing she struck him a severe blow in the face and that he then held her against the wall and slapped her two or three times. He says it was plaintiff's impetuousness that caused the trouble. Plaintiff left the house and returned with a peace officer and he took defendant away. It does not appear that any criminal proceeding was instituted. Defendant returned in a few days and took his personal belongings and May 2nd following, filed the suit in the Republic of Mexico for divorce. Defendant testified that after the quarrel on March 1st and before he and the officer left the house plaintiff told him to take his coat as he was not going to come back. Plaintiff's version of what was said is in conflict with this statement.

It is not necessary to further discuss the evidence on this line for it clearly and conclusively shows that defendant was in the wrong in striking or slapping plaintiff and that it was his actions that

necessitated the calling of the officer. There is evidence which shows that defendant had a violent temper and that at times like this he exercised little restraint upon his actions. Plaintiff was justified in calling the officer for protection. It was defendant's fault that he was taken from the home and it appears to have been his choice that he stayed away, therefore, the court's finding that they were living separate and apart at defendant's fault and without fault on the part of plaintiff was warranted by the evidence.

Defendant contends that the decree does not contain sufficient findings of fact and cites cases in support of such contention that were decided prior to the adoption of the present practice act. Sub-division 3, Sec. 64 of the Civil Practice Act provides that no special findings of fact or certificate of evidence shall be necessary in any case in equity to support the decree. Furthermore defendant caused a transcript of the evidence to be filed and it fully supports the decree.

Plaintiff owned a residence property in O'Fallon which rented for $12. per month and this was used to pay monthly payments on a loan association mortgage. Plaintiff and defendant owned as joint tenants 90 acres of farm land but defendant collected the rents therefrom. She owned no other property and had no other income. Defendant was a justice of the peace, owned property valued at $25,000. and had a gross annual income from his office and property of at least $1800. Under the facts the allowances of alimony and solicitor's fees were proper and are not excessive.

Plaintiff has filed in this court a motion asking this court to fix solicitor's fees incurred on this appeal

and to allow her expense money incurred in printing briefs. Sec. 22 Chap. 28 Smith Hurd Statutes 1935 provides that the court may make such allowance of attorney's fees and suit money as may appear just and equitable as in case of divorce and Sec. 16 of the Divorce Act provides that in case of appeal or writ of error the court in which the decree was entered may grant and enforce the payment of money for defense as shall seem reasonable and proper.

The trial court has jurisdiction in a separate maintenance suit to allow solicitor's fees for services rendered after the decree, Harding vs. Harding 205 Ill. 105 and to make an allowance during the pendency of an appeal Porter vs. Porter 62 Ill. App. 107. Plaintiff's request should have been filed in the trial court. Her motion is stricken.

The decree of the Circuit Court is affirmed.

Decree Affirmed.

Not to be published in full

STATE OF ILLINOIS,

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1937

TERM NO. 21 AGENDA NO. 5

CHARLES TAYLOR,
Plaintiff-Appellant

-v-

JEAN TAYLOR,
Defendant-Appellee

APPEAL FROM
THE CIRCUIT COURT
OF BOND COUNTY.

MURPHY, J.

294 I.A. 619

Plaintiff-Appellant, Charles Taylor, aged thirty-two, and defendant-appellee, aged sixteen, were married December 24th, 1936 and resided together as husband and wife, at Vandalia, until February 13th, 1937. February 25th. plaintiff-appellant filed a complaint for divorce, alleging that defendant-appellee committed adultery February 10th in the Dieckman hotel, in Vandalia, and that on February 13th she committed the act twice, each of said times being with a person known to plaintiff-appellant, and that on divers other dates she committed adultery with persons unknown to plaintiff-appellant. Defendant-appellee filed a petition and procured an order of court directing plaintiff-appellant to name the correspondent. Later, she filed an answer specifically denying the charges of adultery, and set up that plaintiff-appellant left her February 13th without her fault and, by counter-claim, she asked for separate maintenance. Defendant-appellee asked for temporary alimony, solicitor's fees and expense money, but no action was taken prior to the trial.

The cause was tried by a jury which found the defendant-appellee had not committed adultery. After over-ruling a motion for a new trial a decree was entered on the verdict; plaintiff-appellant's complaint was dismissed for want of equity; leave was granted

defendant-appellee to withdraw her counter-claim without prejudice; her petition for temporary alimony and solicitor's fees was denied, and the costs were taxed to the plaintiff-appellant. No cross appeal has been taken by defendant-appellee.

Plaintiff-appellant urges, as grounds for reversal, that the verdict is against the weight of the evidence, and that there was error in the instructions.

Plaintiff-appellant testified that after their marriage he and the defendant-appellee lived at the Dieckman hotel in Vandalia, and the last week in January he saw her with a man unknown to him, in a car in the business district of Vandalia; that they were going east; it was about two o'clock P. M., and that he did not see them togsther again; that he asked his wife about it and she denied being with anyone. He also testified that on the first day of February he saw her come out of the hotel and get in a car with Jack Williams, and drive east; that he later told his wife of the occurrence, and she denied it. He stated that early in February he saw her at "George's Grill" - a coffee shop, or tavern, eating and drinking beer with a man that he did not know; that it occurred about six o'clock in the evening; that on another occasion, early in February, he saw her in a tavern, drinking with a man unknown to him.

Jack Williams testified for plaintiff-appellant that one night early in February he saw the defendant-appellee at "George's Grill", drinking with a man other than her husband; that it was then about seven-thirty.

Gladys Willis testified for the plaintiff-appellant and stated that she went to the Grill and saw defendant-appellee and Ralph Bungy eating and drinking together, and at another time she saw the defendant-appellee with a man other than her husband at a tavern about a mile from Vandalia, and that there were other people present.

Clifford Williams (also known as Jack Williams) testified that in January, 1937 he saw defendant-appellee on the street, in Vandalia, one afternoon; that he invited her to take a ride in his automobile;

that she accepted, and they drove about a mile and a half north of Bluff City, and that he had sexual intercourse with the defendant-appellee. He is indefinite as to when it occurred, except he is sure it was in the winter, and that it was in January.

Lloyd Brown testified that when he and four or five other boys were passing the Dieckman hotel he saw defendant-appellee at the window and that she waved at them, and that he returned the courtesy.

Defendant-appellee denied that she got into a car, with a man, on the streets of Vandalia; denied that she was in a car with Clifford Williams, either in Vandalia or north of Bluff City; denied that she ever had sexual relations with him; admitted that she ate with Ralph Bungy at "George's Grill", but stated she did not leave the grill with Bungy. She was not interrogated as to the other occurrences at the taverns referred to by plaintiff-appellant's witnesses.

Plaintiff-appellant contends that the evidence so clearly establishes defendant-appellee's guilt that this Court should set the verdict aside and direct the entry of a decree granting him a divorce.

The testimony of Clifford Williams that he sustained sexual relations with the defendant-appellee is positively denied by the defendant-appellee. In view of this denial and the further fact that Williams first testified that he was only casually acquainted with ~~defendant-appellee~~ plaintiff-appellant, while on cross examination he admitted an acquaintance of a year or more; his indefiniteness as to the month in which it occurred were all matters touching his credibility, and under the facts and circumstances shown by the evidence the jury might well doubt the truthfulness of his testimony. At any rate, it was purely a question for the jury. Omitting the testimony of Clifford Williams, there is nothing in any of the other acts that convinces one that actual adultery was committed. A flirtation from the hotel window to young men on the streets in day time; riding with men in automobiles and drinking with men, at taverns, with other people present may be conceded to show a lack of discretion becoming a married woman, but to prove adultery there must

be some facts or circumstances showing she has an attachment for the man she meets, or that she has such a depraved mind that the marital obligations have no binding force upon her. In Blake -v- Blake, 70 Ills., 618, the Court said: "There can be nordoubt but adultery may be established by circumstancial evidence, but the proof, says Bishop, Volume 2, page 613, must convince the judicial mind, affirmatively, that actual adultery was committed, since nothing short of a carnal act can lay a foundation for divorce." In Hoef -v- Hoef, 323 Ills., 170, the Court said: "It being important to the well being of society that the marriage relation should not be severed, where a divorce is sought from a wife for adultery, the proof, to warrant a decree, must clearly convince the mind, affirmatively, that actual adultery was committed, as nothing short of a carnal act can lay the foundation for such divorce."

There is no evidence of any clandestine correspondence; not a single word or expression has been shown to have been uttered by the defendant-appellee showing her attachment for any of the men she is charged with having been with at the taverns, or in automobiles. In this state of the record, the verdict of the jury should be sustained.

Plaintiff-appellant contends that the Court erred in giving an instruction on behalf of defendant-appellee which contains the same words as are above quoted from Blake -v- Blake. The Courts of this state have commented upon the practice of converting sentences in the opinion of the Court into instructions, and have held that it is a bad practice, and one that often leads into serious error. (Norkevich -v- Atchison T.&.S.F.Ry.Co, 263 Ills. App., 1)-- but the instruction in this case could not mislead the jury for the reason that the evidence would not warrant any other verdict than the one that was rendered.

Decree affirmed.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

FEBRUARY TERM, A. D. 1938.

Term No. 21

Agenda #19

THE PEOPLE OF THE STATE OF ILLINOIS, for the use of HARRY D. [illegible], Administrator of the Estate of Nathan C. File, Deceased,
Plaintiff-Appellee,

VS.

LONDON & LANCASHIRE INDEMNITY COMPANY OF AMERICA, a Corporation,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, ILLINOIS.

294 I.A. 619

Murphy J:

Appellee has filed a motion to dismiss the appeal in this case and predicates it upon the following state of facts. The notice of appeal was filed in the office of the clerk of the trial court November 2, 1937. The record and report of proceedings were filed with the clerk of the trial court December 31, 1937. The record and report of proceedings were filed in this court January 26, 1938.

Rule 36 of the Supreme Court as amended October 22, 1937 is as follows, "Whether the praecipes do or do not specify any proceedings at the trial, the record on appeal shall be transmitted to the reviewing court not more than 60 days after notice of appeal has been filed." (Assuming that there has been no application and extension of time within the time allowed for the transmitting of the record to the reviewing Court.)

In People vs. Callopy 358 Ill. 11 the court said, "Rules of court, in so far as valid have the binding force of law. North Avenue Building Ass'n vs. Huber 286 Ill. 375"

and in People vs. Cowdrey 360 Ill. 633 the court in discussing its Rule 28 said, "And the Appellate Court was bound to observe Rule 28 of this court," and in Hallberg vs. Goldblatt Bros 363 Ill. 25 the court in considering its Rule 31 said, "This court had adopted Rule 31 before the appeal was taken in this case. We held that the rules of this court are binding upon inferior courts, in the decision of People vs. Callopy 358 Ill. 11. Rule 31 requires that "neither the Appellate Court nor a judge thereof in vacation shall stay the force and effect of an interlocutory order or decree or the proceedings of the court below during the pendency of an interlocutory appeal, except upon notice to opposite parties and an opportunity on their part to be heard and upon examination of the record. No motion to stay shall be entertained until the complete record has been filed in the Appellate Court, and no such stay shall be granted except after hearing and after filing of bond by appellant in an amount and subject to conditions to be fixed by the court of judge." This rule is binding upon the Appellate Courts and is a part of the rules of court referred to in section 78 of the Civil Practice Act."

In Lewis vs. Renfro, 291 Ill. App. 396 in considering Rule 34 of the Supreme Court this court said, "Section 79 of the act, Ill. State Bar Stats. 1935, ch. 110, 207; Jones Ill. Stats. Ann. 104.079, authorizes the Supreme Court to prescribe the manner of giving notice and it has been held that rules of court when established have the force of law, People vs. Callopy, 358 Ill. 11, and are obligatory upon the court itself as well as the parties to the cause coming before it. Lancaster vs. Waukegan & S.W.Ry.Co., 132 Ill. 492; Bender vs. Alton R. Co., 284 Ill. App. 419.

The right to have a case reviewed on appeal was unknown at the common law and exists only by virtue of

statutory enactments, Anderson vs. Steger, 173 Ill. 112; Ziegler vs. Gilliatt, 263 Ill. 587, and any party who wishes to avail himself of the statutory right must conform to the statute and rules of court adopted pursuant to such statute. Coal Belt Electric Ry. Co. vs. Kays, 207 Ill. 632; Conklin vs. Tobey, 224 Ill. App. 142; Berkel vs. Schmitt 244 Ill. App. 437. Courts of review will not vary the application or interpretation of the rules to suit the contingencies of a particular case, Bender vs. Alton R. Co. 284 Ill. App. 419."

Appellant having failed to comply with Supreme Court Rule 36 its appeal is dismissed.

Appeal dismissed.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1937.

Term No. 30 Agenda No. 29

ELLA BAXTER, Administratrix of the Estate of BERNARD E. MORGAN, Deceased,
Plaintiff-Appellant,

VS.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellee.

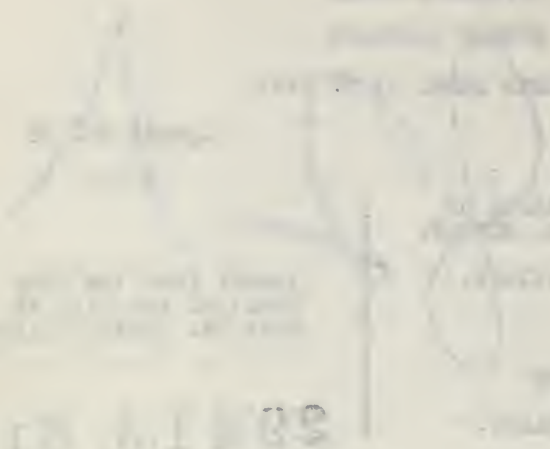
Appeal from the City Court of the City of East St. Louis, Illinois.

294 I.A. 619

Murphy J:

In 1932 Bernard E. Morgan took out a life insurance policy with the defendant company for $148. and in June 1935 he received another policy for $402. The premiums were payable weekly with four weeks of grace within which payment could be made and avoid a forfeiture. The last premium payment made on each of the policies was June 26, 1935. October 3 following, the insured signed a request for reinstatement. It was necessary that the insured submit to a medical examination. This was not done and he died October 27, 1935. Plaintiff instituted this suit to recover the face of the two policies. The verdict was in her favor but on defendant's motion for a judgment notwithstanding the verdict the court set it aside and entered judgment in bar of plaintiff's action. Such ruling is assigned as error.

On October 3 the insured signed a request for reinstatement and a few days prior plaintiff paid the defendant $7. as back premiums. Each of the policies contained the provision that at any time within one year from default in payment of



premiums the policy could be reinstated upon the production of evidence of insurability satisfactory to the company and approved at its home office and upon payment of arrears of premiums. Immediately after the insured signed the request for reinstatement he was taken ill and prevented from having the medical examination and consequently there was no reinstatement. After the death of the insured defendant tendered plaintiff the $7. she had advanced to pay the arrears of premiums but she declined to accept the same.

Plaintiff contends that by reason of certain misleading information given her by defendant's agents relative to the policies being ~~enforced~~ in force and that the premiums were being paid the company is now estopped from claiming the policies lapsed.

No such issue was raised by the pleadings. The complaint alleged the issuance of the policies, the proof of death and that the policies were in force at the time of death. The defendant's answer admitted the issuance of the policies and proof of death but denied that the policies were in force at the time of death and alleged the provisions in reference to lapsing of the same and that the last premium paid was June 26, 1935. If plaintiff desired to rely upon the estoppel that she now claims she should have replied to the answer and alleged the facts upon which she relied to constitute estoppel.

Plaintiff testified, "Mr. Hill (agent for defendant) was my collector and I heard this insurance was paid. He said he would see about it. He said I will let you know. He said he looked it up, the insurance is in force and has been paid. I quit at that." The next conversation was October 3, with another agent and at that time plaintiff was told the policies had lapsed and steps were then taken to reinstate. There could be no estoppel in the latter conversation for plaintiff was told the policies had lapsed and there was no estoppel in the first

conversation for it does not appear that the statement was made before the expiration of the four weeks grace period or that it was made before the insured became ill.

The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

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